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The Cases digested in this Part have been taken from the following Reports :—

I. L. R. Allahabad Series, Vol. XXIX.	Punjab Record (Judicial), 1907.
„ Bombay „ „ XXXI.	„ Law Reporter, 1907.
„ Calcutta „ „ XXXIV.	„ Weekly Reporter, 1907, Nos. 1 to 48.
„ Madras „ „ XXX.	Nagpur Law Reports, Vol. III.
Allahabad Law Journal, „ IV.	Oudh Cases, Vol. X Pts. 1 to 21.
„ Weekly Notes, 1907.	Lower Burma Rulings, 4th Quarter, 1906, and 1st 3 Quarters of 1907.
•Bombay Law Reporter, Vol. IX.	Upper Burma Rulings, 3rd Quarter 1906, and 1st 2 Quarters of 1907.
Calcutta Weekly Notes, from No. 8 in Vol. XI to No. 7 in Vol. XII.	Criminal Law Journal, Vols. V and VI.
Calcutta Law Journal, Vols. V and VI.	Travancore Law Reports, Vol. XXII.
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DEDICATED
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THE HONORABLE SIR CHARLES ARNOLD WHITE, Kt.,
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CHIEF JUSTICE, HIGH COURT OF JUDICATURE, MADRAS,
WHOSE APPRECIATION AND ENCOURAGEMENT
IN CONNECTION WITH THIS COMPILATION
THE COMPILER DESIRES VERY GRATEFULLY TO ACKNOWLEDGE.

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ABBREVIATIONS EXPLAINED.

REPORTS.

A.	Indian Law Reports, Allahabad Series.*
A.L.J. ...	...	...	...	Allahabad Law Journal.*
A.W.N. ...	...	...	...	Allahabad Weekly Notes.*
B. ...	...	...	...	Indian Law Reports, Bombay Series.*
B.H.C. ...	...	...	...	Bombay High Court Reports.
B.L.R. ...	...	...	...	Bengal Law Reports.
Bom. L.R. ...	...	...	...	Bombay Law Reporter.*
Bur.L.R. ...	...	...	...	Burma Law Reports.
C. ...	...	...	...	Indian Law Reports, Calcutta Series.*
C.L.J. ...	...	...	...	Calcutta Law Journal.*
C.L.R. ...	...	...	...	Calcutta Law Reports.
C.W.N. ...	...	...	...	Calcutta Weekly Notes.*
C.P.L.R. ...	...	...	...	Central Provinces Law Reports.
Cr.L.J. ...	...	...	...	Criminal Law Journal of India.*
I.A. ...	...	...	...	Law Reports, Indian Appeals.*
L.B.R. ...	...	...	...	Lower Burma Rulings.*
M. ...	...	...	...	Indian Law Reports, Madras Series.*
M.H.C. ...	...	...	...	Madras High Court Reports.
M.L.J. ...	...	...	...	Madras Law Journal.*
M.L.T. ...	...	...	...	Madras Law Times.*
M.I.A. ...	...	...	...	Moore's Indian Appeals.
N.L.R. ...	...	...	...	Nagpur Law Reports.*
N.W.P.H.C. ...	...	...	...	North West Provinces High Court Reports.
O.C. ...	...	...	...	Oudh Cases.*
P.R. ...	...	...	...	Punjab Record.*
P.L.R. ...	...	...	...	Punjab Law Reporter.*
P.W.R. ...	...	...	...	Punjab Weekly Reporter?.
T.L.R. ...	...	...	...	Travancore Law Reports.*
U.B.R. ...	...	...	...	Upper Burma Rulings.*
W.R. ...	...	...	...	Sutherland's Weekly Reporter.

OTHER ABBREVIATIONS.

Appl. ...	...	...	...	Applied.
Appr. ...	...	...	...	Approved.
D. or Distd. ...	...	...	...	Distinguished.
Disc. ...	...	...	...	Discussed.
Diss. ...	...	...	...	Dissented from.
Exp. ...	...	...	...	Explained.
F. ...	...	...	...	Followed.
(F.B.) ...	...	...	...	Full Bench.
Obs. ...	...	...	...	Observed on.
(P.C.) ...	...	...	...	Privy Council.
R. or Refd. to. ...	...	...	...	Referred to.
(S.B.) ...	...	...	...	Special Bench.

(N.B.)—(1) This Publication embodies cases (Civil and Criminal) from the Reports marked above with asterisks.

(2) In the Punjab Record and the Punjab Law Reporter, the cases are known by their numbers and not by the pages where they are printed; (e.g.) 4 P.R. 1906 would mean Case No. 4. in the Punjab Record of 1906. The same explanation applies to the Punjab Law Reporter also. It has also to be remarked that the Punjab Record and the Punjab Law Reporter have been divided into two sections, Civil and Criminal.

(3) For Cases from Reports other than those published in India, the Vols. and pages are printed exactly in the manner they are to be found in the original cases wherein they are referred to.

Sopce Mohan Gaatterjee.
Pleader.
Utterpara.

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* This is wrongly printed as "Aula".

† This is wrongly printed as "Kor"

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* In the body of the book this is wrongly printed as 11 C W N 107.

† This is wrongly printed as 8 Bom L R 837 in the book.

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* This is wrongly printed as 11 C W N 107, in the body of the book.

† In the book this is wrongly printed as "10 O C 82".

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* Wrongly printed as Shodha in the book.

† Wrongly printed as, '2 M.L.T. 347', in the book.

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* At Col. 187, this is wrongly printed "as 10 C 486".

* This is a mistake for "11 C 186".

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* This is wrongly printed as "188 P R 895".

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(1) Failure to cultivate unculturable land is not—See LIMITATION ACT, No. 112, 53 P.R. 1907 = 39 P.L.R. 1907.

(2)—of claim against defendant—Non-removal of defendant's name from suit—Defendant whether party to suit—See CIV. PRO. CODE, No. 115, 17 M.L.J. 416.

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(4)—of suit—Suit for redemption—Plaintiff suing as sole heir—Death of plaintiff—See MORTGAGE (REDEMPTION), No. 20, 4 A.L.J. 789.

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(5)—of appeal—Death of *pro forma* defendant, whether abates the appeals of other defendants who could have maintained their appeals independently—See ACT II OF 1901 (AGRA TENANCY), No. 4 (a), 4 A.L.J. 809.

Abwab.

(1) *Company's Batta—Abwab.*

A claim for Company's Batta is not necessarily a claim for an abwab. If the rent was fixed in *sicca* rupees and *batta* is claimed so as to make the demand equivalent in current coin, the demand is not illegal. **Ram Saran Sing v. Gyan Sing**, 6 C.L.J. 637.

PETHERAM, C.J., and GHOSE, J.

(2) *Company's Batta—Abwab.*

A claim for Company's Batta which represents the conversion of *sicca* into Company's rupees is not an abwab, but properly forms a part of the rent.

If it is proved that the Company's Batta has been paid without dispute for many years, and its legality is questioned by the tenant, the onus is not upon the landlord to prove that the rent was originally fixed in *sicca* rupees. **Ram Khelwan Singh v. Kumar Rai**, 6 C.L.J. 667.

MACPHERSON, J.

Accounts.

(1) *Limitation Act, Sch. II, Arts. 57 and 85—Account-current—Account, open, mutual.*

Accounts.—(Continued).

An open account is one, which is continuous or current, uninterrupted or unclosed by settlement or otherwise, consisting of a series of transactions.

An account-current is an open or running account between two or more parties, or, an account, which contains items between the parties, from which the balance due to one of them is, or, can be ascertained.

Mutual accounts are such as consist of reciprocity of dealings between the parties, and do not embrace those having items on one side only, though made up of debits and credits (a).

An account, under which one party has merely received and paid monies on account of the other, is not a mutual account properly so-called. Each party must receive and pay on account of the other (b).

A shifting balance, sometimes in favour of one side, sometimes in favour of the other, is a test of mutuality but its absence is not conclusive proof against mutuality (c).

The mere circumstance that, on one solitary occasion, there was a sum to the credit of the defendants in the books of the plaintiffs, does not make the account, between the parties, a mutual account in which there have been reciprocal demands between the parties (d). **Ram Pershad v. Harbans Singh**, 6 C.L.J. 158.

MOOKERJEE and HOLMWOOD, JJ.

References:—(a) 6 M.H.C.R. 142 and 17 M. 293=4 M.L.J. 140, R. (b) 18 Beav. 575 (579); 52 E.R. 225; 23 L.J. Ch. 657; 18 Jur. 763; 2 Phillips 758; 3 Drewry 183 (192); 61 E.R. 873 (876); 2 Y. and C.C.C. 620; 9 Hare 471; 68 E. R. 596; 79 N.Y. 1135; Am. Rep. 496, R. (c) 2 Ind. Jur. N. S. 241; 3 A. 523; 5 C. 759=6 C.L.R. 112; 6 B. 134, R. (d) 5 C. 759=6 C.L.R. 112, F.

(2) *Practice—Court—Decree—No specific direction as to accounts—Decree contemplating accounts—Direction can be given at a subsequent stage.*

Where there is no existing direction as to accounts in a decree, but the decree does contemplate an account (which direction ought to have been incorporated in the decree when passed), it is competent to the Court at any stage of the proceedings to direct necessary inquiries or accounts to be made or taken. **Sir Jehangir Cowsaji Jehangir v. The Hope Mills, Limited**, 9 Bom. I. R. 1980.

DAVAR, J.

Accounts.—(Concluded).

(2-a) Right of mortgagor in a redemption suit to take accounts—See MORTGAGE (REDEMPTION), No. 1, 5 C.L.J. 192.

(3) Adjustment of partnership accounts—Error—Re-opening—Surcharge and falsification—See PARTNERS, No. 2, 11 C.W.N. 776.

(4) Suit to falsify settled accounts—Specific averments needed—Procedure in suits for—See PLEADER and CLIENT, No. 1, 12 C.W.N. 28.

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(1) What amounts to—See LIMITATION ACTS No. 29, 9 Bom. L.R. 715.

(2) What amounts to sufficient, of liability by judgment-debtor—See LIMITATION ACT, No. 33, 6 C.L.J. 141.

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(1) Reference by pleader to arbitration not expressly authorised—Knowledge of party of the reference—His right to call in question the arbitration—See CIV. PRO. CODE, No. 243, 4 A.L.J. 342.

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- 1.—IMPERIAL ACTS.
- 2.—BENGAL ACTS.
- 3.—BOMBAY ACTS.
- 4.—CENTRAL PROVINCES ACTS.
- 5.—LOWER BURMA ACTS.
- 6.—MADRAS ACTS.
- 7.—NORTH-WEST PROVINCES ACTS.
- 8.—ODDH ACTS.
- 9.—PUNJAB ACTS.

1.—Imperial Acts.**Act XXIII of 1839 (Interest).**

Debtor wrongfully withholding payment after demand of payment by creditor—Interest—See HINDU LAW (DEBTS), No. 2, 9 Bom.L.R. 439.

Act XIX of 1841 (Protection of property in cases of succession).

Hindu family governed by the Mitakshara Law—Applicability of—Jurisdiction—See HINDU LAW (JOINT FAMILY), No. 1, 34 C. 939.

Act XXI of 1850 (Freedom of Religion).

(1) Object and meaning of—See ACT X of 1865 (SUCCESSION), No. 1, 52 P.W.R. 1907.

(2) Effect of change of religion before the Act. See HINDU LAW (CONVERSION), No. 1, 4 A.L.J. 365.

1.—Imperial Acts.—(Continued).

Act XXI of 1850 (Freedom of Religion).—(Concluded).

(3) Mahomedan convert's right to contest alienation by his Hindu collateral—See CUSTOMS (PUNJAB), No. 65, 77 P.W.R. 1907.

Act XXVIII of 1835 (Usury Laws Repeal Act).

(1) Rate of interest—Hundis silent as to interest—See ACT XXVI OF 1881 (NEGOTIABLE INSTRUMENTS), No. 3, 11 C.W.N. 105 (P.C.).

Act XV of 1856 (Widow Re-marriage).

(1) S. 2—Hindu Law—Widow re-marriage—Forfeiture of interest in the estate of first husband—Transferees from a person not entitled to transfer—Right of.

A Hindu widow, belonging to Kasodhan caste, in which there is no obstacle, by law or custom, against the re-marriage of widows, does not, by marrying again, forfeit her interest in the property left by her first husband (a).

Where a person died leaving a mother and a widow who re-married, and the widow transferred her interest in her first husband's property to the plaintiff, and the mother sold the same property on the same day to some of the defendants who, in order to pay up the debt contracted by the deceased, mortgaged the property to other defendants, held, that the widow did not forfeit her right on account of re-marriage. Held, further, that the plaintiff was not bound by the arrangement entered into by the defendants, although the money was borrowed to pay up the debts of the deceased, and that the plaintiff was entitled to recover possession of property from the defendants. If the defendants have any just claim as against him, in respect of debts which they had paid off, it is open to them to institute a suit for that purpose. **Khuddo v. Durga Prasad**, 3 A.L.J. 729 = A.W.N. (1906), 299 = 29 A. 122.

STANLEY, C.J., and RUSTOMJEE, J.

References :—(a) 11 A. 330. A.W.N. (1889), 76 and 20 A. 476, F.

(2)—sanctions and validates widow marriages—Custom recorded in the rewaj-i-am—See CUSTOMS (PUNJAB), No. 46, 15 P.L.R. 1907.

Act XX of 1863 (Religious Endowments).

(1) Ss. 3, 7, 14 and 18—Permission to sue—Suit for the removal of Daroga—Removal of hereditary trustees—Order on trustee to furnish security and to render accounts—See RELIGIOUS ENDOWMENTS, No. 3, 34 C. 587.

1.—Imperial Acts.—(Continued).

Act XX of 1863 (Religious Endowments).—(Concluded).

(1-a) S. 7—See No. 1, *supra*.

(1-b) S. 14—See No. 1, *supra*.

(2) Ss. 14 and 18—Suit for declaration that plaintiff is to be appointed manager in preference to defendants not maintainable—Misfeasance or breach of trust not alleged—Application for leave to institute suit.

A suit for a declaration that the plaintiff is a more eligible person than the defendants to be appointed manager of a shrine, in which no misfeasance or breach of trust or neglect of duty is alleged against the trustees appointed under the Religious Endowments Act, is not maintainable under S. 14 of that Act.

Held, also, that a preliminary application to the District Judge for leave to institute the suit was necessary under S. 18 of the Act. **Tajammul Husain v. Fazal Rasul**, 4 A.L.J. 774 = A.W.N. (1907), 287.

STANLEY, C.J., and BURWITT, J.

(2-a) S. 21—See Nos. 1 and 2, *supra*.

(3) S. 18—Leave to bring suit for accounts—Grant of leave—Order, if a decree—Civ. Pro. Code (Act XIV of 1882), S. 2—Appeal.

Act XX of 1863 (Religious Endowments Act) makes no provision for appeal, and an order granting leave to bring a suit, for the purpose of having the accounts of a certain religious endowment, not being a "decree" within the meaning of S. 2 of the Code of Civil Procedure, no appeal lies against such an order (a). **Mczafer Ali v. Mirza Hedayet Hossain**, 5 C.L.J. 641 = 34 C. 584.

MACLEAN, C.J., and FLETCHER, J.

Reference :—(a) 18 C. 382, referred to.

Act III of 1865 (Carriers).

Ss. 3, 8 and 9—Through-booking of goods by steamer and rail—Liability for loss of goods—See CARRIERS, No. 3, 11 C.W.N. 1076.

(2) S. 8—See No. 1, *supra*.

(3) S. 9—See No. 1, *supra*.

Act X of 1865 (Succession).

(1) Inheritance—Succession of daughter among native Hindu converts to Christianity—Hindu Law—Custom—Object and meaning of Act XXI of 1850—Punjab Laws Act, IV of 1872, Ss. 5 and 6—The Indian Partition Act IV of 1893—What is partition—

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1.—Imperial Acts.—(Continued).

Act X of 1865 (Succession).—(Continued).

Partition of business not allowed on equitable grounds—In partition of immoveable property when only money decree allowable—Civil Procedure Code (Act XIV of 1882), S. 561—When no right of cross appeal.

F, a Bengali Hindu convert to Christianity, died in 1888, leaving G, H, and E, his three sons, M daughter, and P a son of his predeceased daughter C. In 1889, E also died. The estate of F consisted of two houses and a business styled George Alfred and Co. which included a Medical shop, a Press, and a Soda Water Factory. M was maintained and educated by her brothers with whom she lived until her marriage in 1897. In 1899, M attained majority, and in 1902 she claimed $\frac{1}{2}$ share of F's estate, under Indian Succession Act X of 1865. Her claim was resisted solely by G whose principal pleas were:—

- (a) The business belonged to him exclusively.
- (b) The Indian Succession Act was not applicable.
- (c) By family custom M was not entitled to any share.

Held, that (a) all Christians are bound by the provisions of Act X of 1865 in matters relating to succession, whether Intestate or Testamentary; but also, as pointed in I.L.R., XXXI Bombay, P. 25, this Act does not affect the rights of co-parcenership as between those to whom it applies;

(b) A native convert to Christianity, living in this Province, is not debarred from either proving that he has adhered to his old personal Law as regards Inheritance, &c., notwithstanding that he has denounced his original religion, or from establishing any family custom, applicable to the parties, such as, that daughters are excluded from succession by sons, &c., as provided for in S. 5 (a) of Act IV of 1872; and

(c) The plain object of Act XXI of 1850 is, not to confer on any party the benefit of the provisions of Hindu or Mahomedan Laws, but, to prevent them from depriving any party or parties of any property, which, but for the operation of such laws, they would be entitled to receive (a).

Held also, that, (a) although the business is the family property, yet, its division is inexpedient and inequitable, on the ground, that it had been carried on by the sole exertions of G,

1.—Imperial Acts.—(Continued).

Act X of 1865 (Succession).—(Continued).

who had specially qualified himself for the same, and M is to get $\frac{1}{2}$ th price of the whole existing stock;

(b) There is absolutely no law or authority now in force independently of the provisions of Act IV of 1893 to justify a money decree in a suit for partition of immoveable property, and M is entitled to get $\frac{1}{2}$ of that property by partition; (b)

(c) Where in a partition case of moveable and immoveable property, a mere money decree is given only in favour of plaintiff in lieu of his share, it is not a decree for partition in favour of all the parties concerned as laid down in 23 P.R. 1905 (c).

Held, further, that a party accepting the decree of the 1st Court by reason of not appealing, or filing cross-objection, as provided in S. 561, C.P.C., against it is incompetent to take cross-objection against the said decree in further appeal. *Found*, in this case, not proved, that F continued to attach himself to Hindu society, or to observe Hindu usages, after his conversion. **Mrs. Edith Susan Mukerjee v. Mrs. George Alfred and others**, 52 P.W.R. 1907.

RATTIGAN and LAL CHAND, JJ.

References:—(a) 9 M.I.A. 195, F. 63 P.R. 1895; 102 P.R. 1904; Civil Appeal No. 1413 (Unreported); 11 A. 100; 4 A. 343; 19 B. 783, R & D. (b) 10 C. 675, *Distd.* (c) 23 P.R. 1905.

(2) Ss. 25 and 46—Difference between co-parcenership and inheritance.

The Act deals with the *devolution* of right on intestacy: it does not purport to enlarge the category of heritable property.

The Act does not affect rights of co-parcenership as between those to whom it applies (a).

The difference between co-parcenership and inheritance is radical. In the case of inheritance, property devolves on death; it survives in the case of co-parcenership; on inheritance, new rights are acquired; on survivorship, the enjoyment of existing rights is increased by the removal of one from the body of co-sharers. **Francis Ghosal v. Gabri Ghosal**, 8 Bom. L.R. 770 = 31 B. 25.

JENKINS, C.J., and BEAMAN, J.

References:—(a) 10 M. 69, *Diss.*; 9 M.I.A. 195, 14 W. R. 33 (P.C.), 12 C. 706 (722), 23 B. 80, R.

1.—Imperial Acts.—(Continued).

Act X of 1865 (Succession).—(Concluded).

(2-a) S. 46—See No. 2, *supra*.

(3) S. 48, *ills. g and h*—Execution of will under pressure—Free agency—Importunity—See WILL, No. 1, 11 C.W.N. 824.

(4) S. 50—Due execution and attestation of will—Acknowledgment of execution—What amounts to attestation—See PROBATE, No. 1, 6 C.L.J. 453.

(5) Ss. 56 and 57—Revocation of will—English Law—See HINDU LAW (WILLS), No. 5, 17 M.L.J. 269.

(5-a) S. 57—See No. 5, *supra*.

(6) S. 78—Will—Power of appointment—Appointment by general bequest—Power created after will.

A general power of appointment may be exercised by a will executed previously to the creation of the power, and that too by mere residuary gift. **Dinsha Sorabji Mody v. Dinsha Sorabji Mody**, 9 Bom. L. 488 = 31 B. 472.

DAYAR, J.

(7) S. 111—Construction of will—Bequest to daughter—Absolute estate.

Where in a Will a legacy was given in the following words:—"On my death, my daughter Surjamoni, who has got sons, and who is a resident of.....shall possess as owner, and possessor of all the rights of gift, sale, etc., in respect of all my property moveable and immoveable, and on the death of my aforesaid daughter, the sons born of her womb will equally own all my property."

Held, upon a construction of the Will, that it was the intention of the testator to give to Surjamoni an absolute estate. **Gobinda Chunder Gupta v. Benode Chunder Dutt**, 12 C.W.N. 44.

GHOSE, C.J., and CASPERSZ, J.

Act VII of 1870.

See COURT FEES ACT.

Act XXI of 1870 (Hindu Wills).

*S. 3, scope of, read with S. 57, Succession Act—See HINDU LAW (WILLS), No. 5, 17 M.L.J. 269.

Act XXIII of 1870 (Coinage).

See TENDER, No. 1, 5 C.L.J. 270.

Act XXIII of 1871 (Pensions).

(1) Jaghir income, liability of, to attachment in execution—Civ. Pro. Code, S. 206—

1.—Imperial Acts.—(Continued).

Act XXIII of 1871 (Pensions).—(Continued).

Interpretation of decree—Right of judgment-debtor to plead illegality of attachment of certain property when no objection was taken on previous occasions to attachment for the same property.

An award of arbitrators directed the payment by the defendant, of a certain sum of money, to the plaintiff and charge the same on a Jaghir income of the defendant. Judgment was given in terms of the award, but the decree, which followed, was silent as to the amount being charged on the Jaghir income. In execution, the Jaghir income was attached on some occasions and portions of the decree-amount were realised. On a subsequent attachment, the judgment-debtor pleaded the illegality of the attachment, on the ground (1) that the decree did not charge the decree-amount on the Jaghir income and (2) that the Jaghir income, being a pension within the meaning of the Pensions Act, 1871, was exempt from attachment. *Held*, (1) that, although the award and the judgment did charge the amount on the Jaghir income, the decree did not do so, the same not having embodied the terms of the award and the judgment. Such decree could not, merely because it purported to follow the judgment and the award, be interpreted as charging the amount on the Jaghir income. The Court executing the decree, ought to give effect to it as it stands; and ought not to read into it provisions to be found in the award or in the judgment, unless and until an amendment of the decree is obtained under S. 206, C. P. Code; and (2) that the Jaghir income, being a pension within the meaning of the Pensions Act, was exempt from attachment. The mere fact that, on previous occasions, the judgment-debtor omitted to object to the attachment, could not debar him from objecting to the legality of the present attachment. **Muhammad Qamar-ud-Din Khan v. Lachmi Nath**, 95 P. R. 1906 = 83 P.L.R. 1907.

ROBERTSON and CHITTY, JJ.

References.—35 P.R. (1900), D; (b) 31 C. 822, D.

(2) Ss. 3, 11 and 12—Assignment of grant made as compensation for abolition of office hereditary in grantee's family, Validity of—Meaning of "Pension."

The pensions referred to in S. 11 are periodical allowances, granted by Government on

1.—Imperial Acts.—(Continued).**Act XXIII of 1871 (Pensions).—(Continued).**

political considerations or on account of past services or present infirmities, or as compassionate allowance, as distinguished from payments by Government "in respect of any right, privilege, perquisite or office" which fall within the definition of "grant of money or land revenue" in S. 8 (a). Therefore, a grant, which is stated in the inam register to have been made by way of compensation for loss sustained on the abolition of an office hereditary in the grantee's family, is clearly a grant falling within S. 8 and not within Ss. 11 and 12, and is assignable. **Subraya Mudali v. Velayuda Chetty**, 2 M.L.T. 83=30 M. 153.

BENSON and WALLIS, JJ.

References:—(a) 4 B. 432, 5 M. 272, 26 A. 617, 8 C.W.N. 665, *Appr. and F.*

(3) S. 4—*Claim for maintenance by a female member—Government pension.*

Where under a *karar*, the defendant, the person responsible to maintain the plaintiff, a Hindu woman, agreed to pay Rs. 100 *per mensem* until her death, the consideration being that the plaintiff gave up various claims, which she had in regard to the family property and also her claim to a portion of the pension granted by Government, a suit by the plaintiff for the recovery of such maintenance is not one "relating to any pension" granted by Government within the meaning of S. 4 of the Act, as there was nothing in the *karar* to show that the maintenance is to be paid out of the pension allowance or was to depend upon it. **Ramachandra Row v. Lakshmi Narasamma Row**, 17 M.L.J. 139=2 M.L.T. 188=30 M. 266.

BENSON and MILLER, JJ.

References:—1 B. 75, 4 M. 341 and 18 M. 187, *D.*

(4) S. 4—*Certificate from Collector—Suit based on agreement to receive maintenance out of cash allowance—Suit relating to a pension or grant of money.*

Under an agreement between the plaintiff and the defendants, the former was entitled to an annual payment of Rs. 52 for her maintenance, out of a cash allowance, which was received by the defendants from Government. She brought this suit to enforce her right under the agreement; but did not produce the

1.—Imperial Acts.—(Continued).**Act XXIII of 1871 (Pensions).—(Concluded).**

certificate from the Collector required by S. 4 of the Pensions Act.

Held, that the certificate was necessary. The words of the section are wide enough to include any suit to enforce such a claim; and provided it relates to a pension or grant of money or of land revenue, it is immaterial whether the claim is based on an agreement between the parties, or arises out of any other legal right or liability, and whether it is a claim for a share by way of partition or maintenance or otherwise. **Damodar Yamanbawa v. Satyabhamabai**, 9 Bom. L.R. 889=31 B. 512.

CHANDAVARKAR and HEATON, JJ.

(4-a) S. 4—*Scope of the section—Personal grants—Endowment for religious and charitable purposes—Suit to set aside Government order imposing full assessment on lands granted for charitable purposes—Jurisdiction of Civil Courts.*

Endowments for religious or pious purposes do not fall within the purview of S. 4 of the Act; the section applies only to personal grants (a).

The Civil Courts have, therefore, jurisdiction to entertain a suit to set aside a Government order imposing the full assessment on certain lands in the plaintiff's possession, granted to his ancestors as an endowment for the charitable purpose of feeding brahmins. **Venkatowara Aiyer v. The Secretary of State for India in Council**, 17 M.L.J. 549.

BENSON and SANKARAN NAIR, JJ.

References:—(a) 2 M. 294, 5 M. 302, 6 M. 361, 11 M. 283, *F*; 22 B. 496, *Diss*; 8 I.A. 77 (P.C.), *R.*

(5) S. 11—See No. 2, *supra*.

(6) S. 12—See No. 2, *supra*.

Act IX of 1872.

See CONTRACT ACT.

Act VIII of 1873 (Northern India Canal and Drainage).

(1) Ss. 21, 22, 24 and 25—*Suit to restrain party who has been permitted under the Act to construct water channel—Jurisdiction of Civil Court.*

A Civil Court has no jurisdiction to decree a perpetual injunction restraining a party, to

1.—*Imperial Acts.*—(Continued).

Act VIII of 1873 (Northern India Canal and Drainage).—(Concluded).

whom permission has been granted under the Act of 1873 to construct a water channel through the land of another, from constructing that channel, provided that the procedure prescribed by the Act has been complied with.

Mokham Din v. Mansabdar, 74 P.R. 1907.

REID, J.

References:—56 P.R. 1897, 46 P.R. 1897, 144 P.R. 1894, 71 P.R. 1888, 114 P.R. 1888, 14 C. 648, R.

(2) S. 22—See No. 1, *supra*.

(3) S. 24—See No. 1, *supra*.

(4) S. 25—See No. 1, *supra*.

Act X of 1873 (Oaths).

(1) Ss. 8 and 12—*Agreement to abide by the oath of a person—Subsequent application to withdraw therefrom, not allowed.*

Where, in a suit, the parties put a joint application evidencing an agreement to abide by the statement on oath of a certain person, but one of the parties thereto, subsequently, asked leave to withdraw from the reference on the ground of the collusion of that person with the other party and no collusion was proved: *held*, he could not be allowed to do so. **Chhiddu v. Kuar Sen**, 3 A.L.J. 654 = A.W.N. (1906), 280 = 29 A. 49.

AIKMAN, J.

References:—4 A. 302, *Appr.*, and 18 A. 46 (49), R.

(1-a) Ss. 8, 9 and 12—*Agreement by plaintiff to take oath or to have the suit dismissed—Failure to take oath—Procedure to be adopted by the Court.*

By an agreement between the parties to a suit, the plaintiff agreed that he should take an oath, and that, on his failure to do so, the suit should be dismissed. *Held*, on the failure of the plaintiff to take the proposed oath, that the agreement could not be recorded as an adjustment of the suit, and the suit should be proceeded with (a).

Per White, C.J.—S. 12 of the Oaths Act directs the Court to record as part of the proceedings; the nature of the oath proposed, the fact that the party was asked to make the oath and refused, together with any reason assigned for the refusal. The section seems to contemplate that the Court shall give such weight, as

1.—*Imperial Acts.*—(Continued).

Act X of 1873 (Oaths).—(Concluded).

it may think fit to the fact that a party has offered to make an oath, and has afterwards refused to make it, whilst it negatives the view that the refusal to make the oath is, in itself, a ground for dismissing the suit or giving the plaintiff a decree, as the case may be.

Per Miller, J.—It may be doubted whether S. 12 of the Act was intended to apply to a case, in which the parties have arrived at an agreement that one of them shall take an oath; but whether that be so or not, it is not right to compel a man against his will to take an oath, by which he is to allege the existence of particular facts. **Majan v. Pathukutti**, 17 M.L.J. 545.

WHITE, C.J., and MILLER, J.

References:—(a) 2 M. 356, F; 17 M.L.J. 99, D.

(2) S. 9—*Agreement to be bound by an oath—Power to retract—Effect of preventing the oath being taken.*

A person, who under S. 9 of the Oaths Act, agrees to be bound by an oath, cannot retract (a). The agreement to be bound by an oath is, in effect, an agreement to treat the evidence given under the oath as the evidence in the case, and to dispense with other evidence. If the party, who has agreed to be bound, prevents the oath being taken, the other party is entitled to a decree, at any rate where it is the plaintiff, who agrees to be bound and the result of his refusal to allow the oath to be taken in the form agreed upon is that there is no evidence in support of his case. **Umajammai v. Muthiah Nadar**, 17 M.L.J. 99.

WHITE, C.J., and WALLIS, J.

References:—(a) 22 M. 234, 22 D. 281, 18 A. 46, R.

(2-a) S. 9—See No. 1-a, *supra*.

(3) S. 12—See Nos. 1 and 1-a, *supra*.

Act II of 1874 (Administrator-General).

(1) S. 18—*Administrator-General holding estate under S. 18, position of—Administrator-General, what payments can be made by.*

The Administrator-General holding an estate under S. 18 of the Act is in no better position than a private administrator. Pending grant of letters of administration, he can only make payments for the benefit of or for the preservation of the assets of the estate. He cannot

I.—Imperial Acts.—(Continued).**Act II of 1874 (Administrator-General).
(Concluded).**

make any payment to the prejudice of the estate (a). In the goods of *Hari Das Dutt*, 11 C.W.N. 193.

HARINGTON, J.

References :—(a) 8 Exch. Rep. 302 at p. 307, R.

Act III of 1874 (Married Women's Property).

- (1) S. 8—*Restraint upon anticipation—Decree passed against separate property of married woman—Attachment—Income of property subject to restraint upon anticipation—Rule 220 of Presidency Small Cause Court Rules—Its effect—Transfer of Property Act, S. 10.*

S. 8 of the Married Women's Property Act was not intended to affect the operation of the doctrine of restraint upon anticipation, by rendering property so restrained liable on contracts made by a married woman, as to her separate estate (a). Although it may not be possible to construe the terms of an earlier Act by a later Act, it is certainly significant that restraint upon anticipation should be sanctioned in the clearest language in S. 10 of the Transfer of Property Act (1882). Restraint upon anticipation is an exception, established by equity in favour of married women, to the general rule of law, which regards conditions in transfers of property restraining alienation as null and void (b). This general rule is embodied in the first part of S. 10 of the Transfer of Property Act, while the exception in favour of married women appears in the proviso. Decrees passed in accordance with S. 8 of the Married Women's Property Act, against the separate property, if any, of the married woman, in respect of a contract entered into by her, cannot be considered as passed against property, which she is restrained from anticipating (c).

Income of property subject to restraint upon anticipation, accruing due after the date of the judgment, cannot be attached in execution of a decree against the separate property of married women (d).

Rule 220 of Presidency Small Cause Court Rules (S. 26C of the C. P. Code) is only a rule of procedure, and the exceptions mentioned in the proviso are not stated in terms to be exhaustive. Such a rule cannot be read as autho-

I.—Imperial Acts.—(Continued).**Act III of 1874 (Married Women's Property).
(Concluded).**

rizing the attachment of property which, by a rule of substantive law now embodied in S. 10 of the Transfer of Property Act, is incapable of being transferred or charged by the beneficiary. *G. Goudoin v. P. A. Venkatesa Mudall*, 17 M.L.J. 363 = 2 M. L. T 323 = 30 M. 378.

BENSON and WALLIS, JJ.

References :—(a) 11 B. 348 ; 13 B.L.R. 383, R. 18 M. 19. F ; 12 C. 522, Diss. (b) 11 Ch. D. 648, R. (c) (1905) Ac. 98, R. (d) (1894) 2 Q. B. 589 ; (1896) 2 Q. B. 48 ; (1896) Ac. 174 ; (1905) Ac. 98, R.

Act IX of 1875 (Majority).

- (1) Ss. 2 and 3—*Age of minority in case of Mohamedans—Where a guardian has been appointed—Guardian, death of, before minor attains age of majority—Limitation Act, 1877, sch. ii, art. 120.*

A Mohamedan brought a suit for a declaration that he was entitled to be the *mutwali* (trustee) of a particular *wagf* (endowment). It was decided by the Court below, that as the suit was brought more than six years after the plaintiff attained the age of sixteen years, the age of majority fixed according to Mohamedan Law, the suit was barred by limitation—

Held, that the age of majority must be governed by the provisions of the Indian Majority Act, 1875, and not according to the provisions of the Mohamedan Law ; and the suit having been brought within six years from the date when plaintiff attained the age of twenty-one years, was not barred by limitation.

Held, further, that, where a guardian has been appointed of a minor, he must be considered to be a minor, until he attains the age of twenty-one years, even though that guardian may have died before the minor attains the age of twenty-one years. *Maulvi Salyad Ahmad v. Maulvi Salyad Muhammad Taqi*, 10 O. C. 247.

CHAMBER, J. C., and EVANS, A.J.C.

Reference :—10 O. C. 1, R.

- (2) S. 3—*Guardian—Appointment of guardian—Certificate of guardianship—Minority, period of—Act XX of 1864 (Bombay).*

For the purposes of S. 3 of the Majority Act, 1875, it is enough that a person has obtained an order for a certificate of guardianship of a

1.—Imperial Acts.—(Continued).**Act IX of 1875 (Majority).—(Concluded).**

minor, under Act XX of 1864; it is not necessary that any formal certificate in pursuance of such order should be obtained. A minor under such a guardianship must, therefore, be deemed to have attained his majority, when he shall have completed his age of twenty-one years. **Shivram Konda Kulkarni v. Krishnabai Kashinath**, 8 Bom. L.R. 897=81 B. 80.

ASTON and HEATON, JJ.

References:—5 Bom. L.R. 708, 13 B. 285 and 16 I.A. 195, R.

(3) S. 3—See No. 1, *supra*.

(4) See MUHAMMADAN LAW (GUARDIANSHIP), No. 1, 10 O.C.I.

Act XI of 1876 (Presidency Banks.)

(1)—*Bank of Bombay—Shareholder—Right to examine the register of share-holders—Object of the search—Corporation—Member of the Corporation—Common law right of the member to inspect books of the Corporation.*

The plaintiff, a share-holder of the Bank of Bombay, claimed to be allowed to inspect the register of share-holders of the Bank, with the object that "having observed irregularities in the management of the said Bank, in the election of its Directors, in the advancing of large sums of money to its Directors, and in other matters relating to the said Bank," he desired inspection of "the register of the present share-holders, so as to enable him to communicate with the other share-holders, and, if possible, obtain their assent to certain proposed resolutions for the better management of the affairs of the said Bank and for the removal of some of the existing Directors, which he intended to bring before a general meeting of the share-holders."—

Held, allowing the plaintiff's claim, that it was but reasonable, that a share-holder of a concern like the defendant Bank, should desire from time to time to consult other share-holders and discuss with them the affairs of the Bank, for the purpose of taking concerted action, where and when necessary, apart from any question of any irregularity existing in the management of the Bank, and that, for that purpose, inspection of the register of share-holders was necessary.

Every member of a Corporation has the right, under common law, to inspect its books and records. The right does not cease, merely

1.—Imperial Acts.—(Continued).**Act XI of 1876 (Presidency Bank).—(Old).**

because a corporation is created by a statute, which does not confer the right, unless the statute expressly excludes it.

A member of a Corporation has a right to inspect any of its books, provided he has a definite object or specified purpose in which he is interested and provided also that an inspection of the book, which he requires, is necessary for that purpose. He must satisfy the Court that he is seeking inspection, not from mere idle curiosity or from some speculative purpose, but that he has some reasonable and definite object, in which he is interested, and for which the inspection is required, whether that definite object concerns or not any subject then actually in controversy or discussion. **Soolleman Somji v. The Bank of Bombay**, 9 Bom. L.R. 165=81 B. 319.

CHANDAVARKAR and BATTY, JJ.

References—(1795) 2 Stra. 1221 and (1831) 2 B. and Ad. 115 followed.

Act I of 1877.

See SPECIFIC RELIEF ACT.

Act III of 1877.

See REGISTRATION ACT.

Act XV of 1877.

See LIMITATION ACT.

Act VIII of 1878 (Sea Customs).

(1) *Ss. 18, 19 A—Powers of Customs to detain goods with counterfeit trade mark.*

Under S. 18 of the Sea Customs Act, as amended by the Merchandise Marks Act of 1889, no goods specified in clauses (a) to (f) shall be brought into British India; and clause (d) refers to "goods having applied thereto a counterfeit trade mark within the meaning of the Penal Code, or a false trade description within the meaning of the Merchandise Marks Act, 1889." So, if the goods come within the specification mentioned in the section, it would be the duty of the Collector of Customs, as representing the Government, to stop the goods, from being brought into British India; and the Collector has this power, although no regulations have been framed by the Governor-General in Council under sub-sec. (2) of S. 19 A, as the power of detention is clearly implied by S. 19 A, apart from the positive words of S. 18

1.—Imperial Acts.—(Continued).**Act XII of 1875 (Sea Customs).—(Concluded).**

that no goods of the class specified are to be brought into British India. **Nemi Chand v. Secretary of State for India**, 34 C. 511.

MACLEAN, C.J., GEIDT and WOODROFFE, JJ.

(2) S. 19 A.—See No. 1, *supra*.

Act XVIII of 1879 (Legal Practitioners).

- (1) *Ss. 6, 12, 13, 27, 28, 29, 30—Acceptance of back-fee improper—Misconduct of Counsel—Act I of 1846, S. 7—Act XX of 1865—Act IX of 1872, S. 23—Appeal dismissed in default—Counsel not appearing on the ground of his client not depositing back-fee—Sufficient cause for its restoration.*

Held, by a majority (of 7 Judges) of the full Court (consisting of all the 9 Judges), that any legal practitioner, who accepts a case, on the condition of receiving any portion of his fee or other remuneration, on his client's success, wholly or partly, in the litigation, is guilty of grossly improper conduct in the discharge of professional duty within the meaning of S. 13 of the Legal Practitioners' Act XVIII of 1879 and such a contract is in itself unlawful (a).

Held, by Chatterji and Lal Chand, JJ.—That, so far as back-fee is concerned, this rule cannot apply to pleaders whose rights, duties and remuneration are to be determined under the Legal Practitioners' Act, XVIII of 1879, which, in fact, is the source of their status; but the accepting or receiving, on such condition, a specified share of the proceeds of litigation, which is quite different from back-fee, is undoubtedly objectionable, and can be dealt with under S. 13 of the said Act (b). **Ganga Ram v. Devi Das**, 45 P.W.R. 1907 (F.B.) = 33 P.L.R. 1907 = 61 P.R. 1907.

SIR WILLIAM CLARK, C.J., REID, CHATTERJI, ROBERTSON, KENSINGTON, JOHNSTONE, RATTIGAN, LAL CHAND and CHITTY, JJ.

References:—(a) 5 P.R. 1878 (F.B.), overruled; 69 P.R. 1894, 21 S.W.R. 297, 4 C.W.N. 104, 5 B. 258, 8 B. 413, 3 Bom. L.R. 102, 3 M. 138, 26 P.R. 1874, 51 P.R. 1895, 49 P.R. 1906, 5 S.W.R. 307, 25 A. 509, 1 Bail Court 544, *Cordery's Law of Solicitors*, 8rd edition, 273, 194 P.R. 1883, 99 P.R. 1901, 96 P.R. 1902, 15 P.E. 1897 (Cr.), 11 C. 238 (257), 29 C. 595, 20 B. 677, 13 C.B.N.S. 677, L.R. House of Lords 500 (507), 11 A. 72, 4 Bengal L.R. 12 and 13, 1 N.W.P. 1, 5 B. 261, *Colorado Bar Association's Code of Legal Ethics*, Rule 50, New

1.—Imperial Acts.—(Continued).**Act XVIII of 1879 (Legal Practitioners).—(Continued)**

Jersey Court of Errors and Appeals, Lawyer's Annotated Reports, Vol. 58, p. 476, 21 *Lawyer's Annotated Reports* 369, *Columbia Court of Appeals, Lawyer's Annotated Reports*, Vol. 41, p. 526, *United States Supreme Courts Reports Lawyer's edition*, Vol. 28, pp. 64 and 65, S. 11 of *Attorneys and Solicitors Act*, 1870, 1 *Chancery Division*, p. 573, 2 Q.B. 6 L.J.K.B. (O.S.), 24, 30 L.J.C.P. (N.S.), 217, 32 L.J. *Chancery* (N.S.), 794, R. (b) 5 P.R. 1878 (F.B.), *Appr.*

(1-a) S. 12—See No. 1, *supra*.

(2) S. 13—*Subordinate Courts—Jurisdiction of—Enquiry into offences referred to in S. 13.*

A pleader was found guilty of tempting and inducing two subordinates of the Collector's Office, to act contrary to their duty, in allowing him to examine the treasury accounts. The Collector directed a Deputy Collector to charge him and to try the charge. *Held*, that the Deputy Collector was competent to adjudicate upon the charge. A Court subordinate to the High Court is competent to try offences falling under clauses (c to f) of S. 13 of the Act. *In the matter of Muhammad Abdul Hai, Pleader*, 3 A.L.J. 811 = A.W.N. (1906), 268 = 29 A. 61.

KNEX, J.

References:—15 C. 152 and 26 M. 448, R. 27 C. 1023, *Diss.*

(2-a) S. 13—See Nos. 1 & 2, *supra*.

(2-b) S. 27—See No. 1, *supra*.

(3) S. 28—*Special agreement—Payment of fees—Agreement in vakalatnama—Misjoinder.*

J, a vakil, took a loan from C. The agreement was that the loan would be set off against fees in cases of C, in which J would appear and file certificates. C brought a suit for recovery of the loan, and J with his brother A brought a suit for declaration that the debt was satisfied. It was found that J and A had rendered professional services and had filed certificates in cases in which they had appeared.

Held, that J was entitled to a deduction from the loan of his claim for the remuneration actually found due to him for professional services, as the fact of the engagement was proved by the *vakalatnama* which provided that he was to be remunerated (a).

Held, further, that the fact that J's brother appeared as a co-plaintiff did not prejudice C,

I.—Imperial Acts.—(Continued).

Act XVIII of 1879 (Legal Practitioners).—(Concluded.)

and the suit should not be dismissed for misjoinder of parties. **Chhannu Lal v. Asharf Lal**, 4 A.L.J. 535. = A.W.N. (1907), 230.

GRIFFIN, J.

References:—(a) 26 A.W.N. 235 and 12 A. 169, D.

(4) S. 28—See Nos. 1 and 3, *supra*.

(5) S. 29—See No. 1, *supra*.

(6) S. 30—See No. 1, *supra*.

Act V of 1881 (Probate and Administration).

(1)—*Locus standi of a legatee, having only a life interest in the income of fractional portion of the testator's estate, to apply for Probate or Letters of Administration with the will annexed—Amendment of application for Probate to one for grant of Letters of Administration.*

A testator left by will the income of a portion of his immoveable property, for life, to his two widows. As to the rest of his property, he died intestate. One of the widows applied for Probate of the will, the execution of which was not in dispute. The applicant was not named as executrix in the will.

Held, that (1) the applicant, being neither an executrix in the will nor by necessary implication, was not entitled to get Probate:

(2) Under both Indian Law and English practice, universal legatees are entitled to Letters of Administration with the will annexed and not to Probate:

(3) A legatee, who has bequeathed only a life interest in the income of a fractional part of the testator's property, is not, as such, entitled to ask either for Probate or for Letters of Administration with the will annexed and, under these circumstances, a prayer for grant of Probate cannot be altered to one for obtaining Letters of Administration:

* (4) The grant of Probate does not give the grantee possession of the property to which it relates, but only the right to sue for its possession. (a). **Mehar Chand v. Mussammat Lachhmi**, 15 P.W.R. 1907.

CHATTERJI, J.

References:—(a) 22 W.R. (Eng.) 874 and 7 B.L.R. 568, D. 15 M. 360 and 19 C. 582, referred to.

I.—Imperial Acts.—(Continued)).

Act V of 1881 (Probate and Administration).—(Continued.)

(2) S. 33—*Minor wife—Letters of Administration for the use and benefit of—Husband, grant to.*

The husband of a minor wife, before he applies for the grant of letters of administration to him, for the use and benefit of the minor, must get himself duly appointed guardian, for the purpose of applying for such grant as such assigned guardian. **In the goods of Sreemutty Nerojini Dabi**, 11 C.W.N. 697 = 84 C. 706.

WOODROFFE, J.

(3) S. 50—*Revocation of probate—Proof in solemn form.*

A will was proved by an executrix in common form, without issuing citation to the next reversioner. She was the sole legatee under the will. On her death, her heir took possession of the property as heir:

Held, that the heir of the executrix may be ordered to prove the will in solemn form in the presence of the next reversioner. In default, the probate was revoked. **In the goods of Gopi Mohun Bysack and in the matter of the Petition of Nema Chand Bysack**, 5 C.L.J. 560.

WOODROFFE, J.

(4) S. 50—*Citation on minor—Minor represented by applicant as guardian—Proceeding defective—Revocation, application for—Applicant acting in concert with another.*

Where an applicant for probate of a will took out citation upon a minor, who was represented by the applicant herself as guardian,

Held, that the proceedings to obtain the grant were defective in substance, and the grant should be revoked.

The fact that the petitioner for revocation of probate was acting in concert with somebody else could not take away the right which she otherwise possessed of applying for revocation. **Shorashibala Debi v. Anandamoyee Debi**, 12 C.W.N. 6.

GHOSH and CASPERSZ, JJ.

(5) S. 78—*Object of taking administration bond—Security, sufficiency of—See PROBATE, No. 1, 6 C.L.J. 458.*

(6) S. 113—*Effect of dealing with bequeathed property—Assent to bequests—Divesting of executor's interest—Mortgage by guardian—Necessity.*

1.—Imperial Acts.—(Continued).

Act V of 1881 (Probate and Administration).—(Concluded).

An executrix, appointed under her husband's will, mortgaged the properties bequeathed to her sons, describing herself as the guardian of the minors. *Held* that her dealing with the property showed that she, as an executrix, assented to the bequests, and the effect of her so assenting was to divest her of all interest therein as executrix.

Held also that there was no sufficient proof in that case to warrant the Court to hold that the mortgagee advanced the money to the guardian of the minor, believing honestly in the existence of a reasonably credited necessity (a). **Vijayarangam Pillai v. Devakiammal**, 2 M.L.T. 343.

WHITE, C.J., and SUBRAHMANIA IYER, J.

Reference:—(a) 6 M.I.A. 393, *Appl.*

Act XXVI of 1881 (Negotiable Instruments).

(1) *Ss. 8, 27 and 78—Suit on a Pro-note—Validity of plea that the holder is a mere benamidar not entitled to sue—Undisclosed principals cannot sue or be sued on a negotiable instrument—Law Merchant before the Act—Bills of Exchange Act, 1882—Contract Act, 1872.*

S. 78, which provides that "payment—must, in order to discharge the maker, be made to the holder" is imperative and precludes the maker, when sued on the instrument, from pleading discharge by payment to any one but "the holder." The use of the words "entitled in his own name" in the definition of "holder" in S. 8, prevents any one from claiming the rights of a "holder" under the Act, on the ground that the ostensible holder was a mere *benamidar*. Under S. 27 also, a principal can only be made liable, through his agent, on a negotiable instrument, when the agent acts in the principal's name, *i.e.*, when he signs as agent. An undisclosed principal cannot be sued on a negotiable instrument; because, in the case of such instruments, passing from hand to hand, usage and policy alike require that the real contract should appear on the face of the instrument.

The provisions of the Contract Act as to rights and liabilities of undisclosed principals are not intended to alter well-established rules as to negotiable instruments, which continued to be governed by the Law Merchant reproduced in the Negotiable Instruments Act. *Ss. 2, 7 (1).*

1.—Imperial Acts.—(Continued).

Act XXVI of 1881 (Negotiable Instruments).—(Continued).

28, 59, Bills of Exchange Act, are also in accordance with the above view. **Subba Narayana Vathiyar v. K. Ramasawmi Iyer**, 1 M.L.T. (F.B.) 377=16 M.L.J. 508=30 M. 88.

WHITE, C.J., BENSON and WALLIS, JJ.

References:—Second Appeal No. 182 of 1891, Madras (Unreported); 21 M. 30 and 28 M. 205, *Appr. C.R.P.* No. 578 of 1895, 17 M.L.J. 64 and 21 M. 391, *overruled*. 28 M. 597, *explained*. 2 C.W.N. 286; L.R. 9 Ch. 635; (1865) L.R. 1 Q.B. 97, (1848) 5 C.B. 583, *R.*

(2) *Ss. 8 and 46—Indorsement for purposes of collection—Return of instrument without collection—Right of indorser to strike out indorsement and to sue—Position of indorsee.*

An indorser, who indorses a bill to another for purposes of collection, is entitled, on the return of the bill without collection, to strike out his indorsement and to make himself the last indorsee, the holder within the meaning of S. 8 of the Act. He is, thereupon, entitled to receive payment and to sue (a).

An indorsement for collection does not, as between the indorser and the indorsee, pass the property in the bill to the indorsee, though it puts him in a position to make title for a subsequent holder in due course (b).

An indorsee for collection, after returning the bill to his indorser, does not come within the definition of a holder in S. 8 so as to be entitled to sue.

The holder as defined in S. 8 means any person entitled in his own name thereof and to receive or recover the amount due therefor from the parties thereto; that is to say, the person so entitled on the face of the bill (c).

The Act contains no provisions as to striking out indorsement, but there can be no doubt that, when a drawer or indorser takes up a bill by paying the holder, he is entitled to maintain a suit on the bill against the parties antecedent to himself and to strike out subsequent parties who, by reason of his payment, have ceased to have any rights or liabilities under the bill. By such a payment he is considered to acquire a fresh cause of action, being subrogated to the holder as regards all parties antecedent to himself (d). **Subrahmanian**

1.—Imperial Acts.—(Continued).

Act XXVI of 1881 (Negotiable Instruments).—
(Concluded).

Chetty v. Alagappa Chetty, 17 M.L.J. 414 = 30 M. 441.

BENSON and WALLIS, JJ.

References :—(a) 2 C. and M. 416, 3 Wheaton 172, 28 M. 544, R ; (b) 15 Q.B. 995, R ; (c) 30 M. 93, R ; (d) 17 M. 197, 28 M. 544, R.

(2-a) S. 27—See No. 1, *supra*.

(2-b) S. 46—See No. 2, *supra*.

(2-c) S. 78—See No. 1, *supra*.

(3) 80—Hundi, *suit on—Collateral agreement as to interest—Rate of interest—the Usury Laws Repeal Act (XXVIII of 1885). Evidence Act (I of 1872), S. 92, prov. 2.*

Hundis upon which a suit was brought were silent as to interest. But it was proved that in accordance with the custom of the district the parties had entered into a collateral agreement, embodied in written documents, that the *hundis* should bear interest at 30 per cent. per annum.

Held—That S. 80 of the Negotiable Instruments Act, being an enabling section, was no bar to the recovery of interest at the above rate. **Goswami Sri Ghansham Lalji v. Ram Narain**, 11 C.W.N. 105 (P.C.) = 4 A.L.J. 29 = 9 Bom. L. R. 1 = 1 M.L.T. 427 = 17 M.L.J. 35 = 5 C.L.J. 7 = 29 A. 33.

LORD MACNAUGHTEN, SIR ARTHUR WILSON,
and SIR ALFRED WILLS.

(4) S. 80—*Presumption as to interest when pro-note is silent—Oral evidence of contemporaneous agreement to pay interest, admissibility of—Evidence Act, S. 92. Prov. 2.*

Where there is no mention in the pro-note of the rate of interest, interest at 6 per cent. is payable under S. 80, Negotiable Instruments Act, and oral evidence is inadmissible to prove a contemporaneous agreement to pay interest at a certain rate. **Fatuma Bibi v. Hanumantha Row**, 17 M.L.J. 296.

BENSON and WALLIS, JJ.

Reference :—30 C. 446, D.

Act II of 1882.

See TRUSTS ACT.

Act IV of 1882.

See TRANSFER OF PROPERTY ACT.

Act V of 1882.

See EASEMENTS ACT.

1.—Imperial Acts.—(Continued).

Act VI of 1882 (Companies).

(1) S. 4—*Compulsory registration of chit fund consisting of more than twenty subscribers—Test.*

The test for determining whether a chit fund falls within S. 4 of the Act is whether there is an "association" consisting of more than twenty persons, with joint rights and liabilities, having for its object the acquisition of gain. Where, therefore, a chit concern is the business of one person alone who is its proprietor, and the chit collections are under his control and at his absolute disposal, and the subscribers have nothing to do with the management of it, the chit fund is not the joint concern of the whole body of subscribers, nor have they joint rights and liabilities or mutual rights and duties, and registration of such a fund is not compulsory under the Act, though it may consist of more than twenty subscribers. **Subbler v. Ramler**, 2 M.L.T. 52.

MILLER, J.

References.—20 M. 68, *Appl.* ; 19 M. 31, 1 M.L.T. 106, D.

(1-a) S. 130—See No. 4, *infra*.

(2) Ss. 147, 177, 195—*Voluntary winding up of Company continued under subsequent order of Court—Effect of, on secured and unsecured creditors—Meaning of "Liabilities" in S. 147 of Companies Act—Insolvency—Interest subsequent to the order of winding up.*

The Jamna Mills Company of Delhi, on 7th January, 1899, mortgaged their premises for a lakh of rupees to D and Co.

On 11th January and 10th February, 1899, the Company further mortgaged it for another lakh of rupees to K and Co.

Subsequently, the Company went into voluntary liquidation, which was continued by order of Court which appointed a liquidator. On 26th January, 1901, the liquidator sold the whole business to S and Co., for a sum not sufficient to recover the principal and interest of the first lien-holders, D and Co., the second lien-holders, K and Co., and the unsecured creditors, all taken together.

The question in dispute was how the purchase money was to be divided among the three bodies of creditors.

D and Co. claimed that they should be paid, not only the full amount of the principal, but

1.—Imperial Acts.—(Continued),

Act VI of 1882 (Companies).—(Continued),

also the interest on their mortgage-money, according to the terms of their mortgage-deed until the date of repayment.

K and Co. objected that no interest can be awarded to D and Co. after the date of the order of winding up.

The unsecured creditors objected that neither D and Co. nor K and Co. are entitled to any preference at all as against themselves and relied on S. 177 of the Companies Act, where, in the distribution of assets, no mention is made of secured creditors.

Held that S. 147 of the Companies Act, and not S. 177, is applicable to the case, and that the liquidation, though commenced as voluntary, came under the supervision of the Court and under S. 195 of the Companies Act, it proceeds thenceforth as when the Company is wound up under orders of Court; the result being that a voluntary winding up, with a supervision order, has in all respects the same operation as if it had been originally a compulsory order, under which secured creditors are given preference over unsecured creditors. (a)

Held, also, that, under S. 147 of the Companies Act, secured creditors can only prove for the balance, after deducting the value of their securities, as it exists at the date of the order for winding up, and are not entitled to prove for interest subsequent thereto. The law as to winding up of Companies is intimately connected with the law of Insolvency, where the same principle of law holds good.

Held, further, that the words "Liabilities existing at the date of the order of winding up order" mean liabilities valued at that date, whether secured or unsecured, and do not include future liabilities; and that interest subsequent to the order of winding up does not continue to be a charge on the assets, and it is payable only after all debts have been paid in full (b). **Ram Saran Das v. Basheshwar Nath**, 55 P.W.R. 1907.

CLARK, C.J., and REID, J.

References:—(a) 11 Equity 478 (498), F; 16 A. 53, R and Expl; (b) 1 Ch. 689, 64 Chancery Division 648, 18 Equity 623, F; Kellock's case (3 Ch. Appeal 169), 18 Ch. pp. 370, 377, R; 16 A. 53, Expl. 32 Ch. p. 41 (1896), D.

1.—Imperial Acts.—(Continued),

Act VI of 1882 (Companies).—(Continued),

(2-a) S. 164—See No. 4, *infra*.

(3) Ss. 169, 177, 185, 189, 201, 202—*Appeals from Court's orders regarding winding up of a Company—Position of liquidators—Delegation of powers by liquidators, validity of.*

An appeal lies from any order or decision made by the Court, in the matter of the winding up of a company, whether the winding up be compulsory, voluntary or under supervision. The language of the first part of S. 169 is taken from S. 124 of the Companies Act of 1862, substituting the words "by the Court" for "by any Court having jurisdiction under this Act." The right of appeal conferred by S. 124 extends to all decisions in the matter of the winding up of a Company, and the substitution of the words "by the Court" does not restrict the right of appeal to cases, in which a company is being wound up compulsorily by the Court.

The original liquidators duly appointed under S. 177 (b) cannot delegate their duties to arbitrators or any one else. Once appointed, they could not be removed by the company, but only by the Court under S. 185, on due cause shown. In the discharge of their duties, they are not subject to the control of the Company, except in so far as the sanction of an extra-ordinary resolution of the Company is required in the case of arrangements with the creditors or debtors of the Company made by the liquidators under the supervision of the Court in a voluntary winding up under Ss. 201 and 202.

The proceedings of the arbitrators, directors and the Company, contrary to the above rules, are *ultra vires* and illegal.

If new liquidators are validly appointed by the Court under S. 185, they are bound to take up the winding up, at the point where the old liquidators had left off, ignoring all that the arbitrators had done *ultra vires* and not to call a meeting of the Company to consider what further steps should be taken in the matter of winding up; because, the general meeting of the Company has no legal competency to give directions to the liquidators. **Kesava Rao Naidu v. Murugappa Mudali**, 16 M.L.J. 597=80 M 22.

BENSON and WALLIS, JJ.

(3-a) S. 177—See Nos. 2 and 3, *supra*.

I.—Imperial Acts.—(Continued).**Act VI of 1882 (Companies).—(Concluded).**

- (4) *Ss. 182, 130, 165—Joint stock company—Liquidator—Calls on shares—Suit by the liquidator to recover calls—Civil Court—Jurisdiction.*

A suit brought by the liquidator of a joint stock company, against its share-holders, for the recovery of calls in liquidation, is one which can be entertained by the Court of Subordinate Judge. S. 182 of the Indian Companies Act presents no bar to the jurisdiction of the Court. **Bai Chanchal v. Laxmi Dying Co., Ltd.**, 9 Bom. L.R. 825.

JENKINS, C.J., and BEAMAN, J.

- (5) S. 185—See No. 3, *supra*.
 (6) S. 189—See No. 3, *supra*.
 (7) S. 195—See No. 2, *supra*.
 (8) S. 201—See No. 3, *supra*.
 (9) S. 202—See No. 3, *supra*.

Act XIV of 1882.

See CIV. PRO. CODE.

Act XV of 1882 (Presidency Small Cause Courts).

- (1) *S. 38, Ch. VII—Suit—Proceeding—Power of the Small Cause Court in the Presidency Town to order new trial.*

The Presidency Small Cause Court cannot take action under S. 38 of the Presidency Small Cause Courts Act, 1882, in reference to an order passed in a proceeding under Chapter VII of the Act. **Ramkrishna Sitaram v. Haji Dawood Ismail**, 9 Bom. L.R. 208 = 31 B. 259.

JENKINS, C. J., and KHAREGHAT, J.

- (2) *Ch. VII—Power of the Small Cause Courts to set aside ex parte order—See CIV. PRO. CODE, No. 78, 8 Bom. L.R. 803 = 31 B. 45.*

Act XX of 1882 (Paper Currency).

- (1) See **TENDER**, No. 1, 5 C.L.J. 270.

Act II of 1885 (Income Tax).

- (1) *Ss. 4; 5—See ACT IX OF 1880 (ROAD CESS, BENGAL), No. 3, 5 C.L.J. 148.*

- (2) S. 5—See No. 1, *supra*.

Act VII of 1887 (Suits Valuation).

- (1) *Ss. 3, 7, 8, 11—Suit for declaration of title to land—Valuation fixed for purpose of jurisdiction—Court's power to fix valuation when it is disputed.*

The words "as determinable" in S. 8 of the Suits Valuation Act, mean determinable by the Court, which has to try the case.

I.—Imperial Acts.—(Continued).**Act VII of 1887 (Suits Valuation).—(Contd.)**

Per ASTON, J.—There is no express provision in the Suits Valuation Act, making the valuation, for the purpose of jurisdiction, *prima facie* determinable by the plaintiff in any suit, which can be valued lower for the computation of Court-fees. S. 4 of that Act indicates that the principle adopted by the legislature, for valuing a suit mentioned in Sch. II, Art. 17, Court Fees Act, which relates to land or an interest in land, is that the value of such a suit, for purposes of jurisdiction, shall be governed by the value of the land or interest in land. Where such value is not determined by Rules made under S. 3 of the Suits Valuation Act, the value must, (where disputed), be determined by judicial decision in the suit, such determination being subject to the provisions of S. 11 of the Act. **Dayaram Jagjivan v. Gordhandas Dayaram**, 8 Bom. L.R. 885 = 31 B. 73.

RUSSELL, Ag. C.J., and ASTON, J.

References:—2 A. 720, 13 C. 162, 15 B.L.R. *Appl*; 4 B. 515, 29 B. 207, 8 C. 975, 29 B. 229, 17 C. 680 (683), 8 C. 75, 9 B. 20, 27 M. 480 and 8 B. 31, R.

- (2) S.—7 See No. 1, *supra*.
 (3) S. 8—See No. 1, *supra*.
 (4) S. 11—See No. 1, *supra*.

Act IX of 1887 (Provincial Small Cause Courts).

- (1) *Ss. 16 and 33—Suit of small cause nature tried as regular suit by Judge having small cause powers—Effect of such procedure.*

Where a Judge presiding over a Small Cause Court and also over a Court of ordinary jurisdiction tried a suit of, small cause nature, by mistake, as a regular one, *held*, that the mistake did not alter the character of the suit. An appeal, therefore, would not lie from a decree in that suit, under S. 540 of the Civ. Pro. Code. **Nga Shwe Tha v. Nga Po**, U.B.R. (1907). Provincial Small Cause Courts Act, 1.

SHAW, J. C.

References:—12 B. 486, 25 B. 417, R.

- (1-a) *S. 16—Small Cause suit tried as ordinary suit by both the lower Courts, effect of—High Court's powers of interference—Civ. Pro. Code, S. 646 B.*

Where both the lower Courts tried a small Cause suit as an ordinary suit, and the lower

1.—Imperial Acts.—(Continued).

Act IX of 1887 (Provincial Small Cause Courts).—(Continued).

Appellate Court directed the plaintiff to pay the defendant's costs, the decree of the District Judge must, notwithstanding S. 16 of Act IX of 1887, be treated as effective, so as to enable the defendant to recover the amount of costs; and the High Court, in the exercise of its discretion, will decline to interfere in revision (a).

S. 646 B of the Code is an enabling section and does not cut down the jurisdiction of the appellate tribunal. **Sri Raja Simhadri Appa Rao Bahadur, Minor, by his guardian Sri Raja Ramachandra Appa Rao Bahadur v. Chelasane Bhadrappa**, 1 M.L.T. 414 = 30 M. 41.

WHITE, C.J.

References :—(a) 21 M. 239; 27 M. 479, 25 A. 135, R.

(2) S. 17—Application for review—Deposit in Court—Security for performance.

In the proviso to S. 17 of the Provincial Small Causes Courts Act, 1887, the words "at the time of presenting his application" govern and refer to both the "deposit of the amount in Court," and "the giving of security, &c."; therefore, "deposit" or "security" is a condition precedent to the granting of the review. **Somabhai Hirachand v. Wadilal Premchand**, 9 Bom. L.R. 893.

RUSSELL, AG. C. J., and BATTY, J.

References :—18 C. 83, 28 A. 470, F; 13 M. 171 (F.B.), Diss.

(3) S. 17, Sub-S. (1)—Order of dismissal for default under S. 102, C.P.C.—Whether *ex parte* decree—See CIV. PRO. CODE, No. 3, 4 L.B.R. 17.

(4) S. 25—Small Cause Court decree wrong in law—High Court's power to interfere.

Where the decree of a Small Cause Court (which includes the judgment) involves a substantial error of law, which, in the opinion of the High Court, has occasioned a failure of justice, the High Court has power to interfere under S. 25 of the Act. **Nilmani Maitra v. Mathura Nath Joardar**, 5 C.L.J. 413.

MACLEAN, C.J., and BANERJEE, J.

References :—21 A. 89, 16 A. 476, 23 B. 894, R.

(4-a) S. 25—Power of High Court to exonerate defendant against whom decree has been

1.—Imperial Acts.—(Continued).

Act IX of 1887 (Provincial Small Cause Courts).—(Continued).

passed and pass a fresh decree against another—See CIV. PRO. CODE, No. 279, 17 M.L.J. 62.

(4-b) S. 33—See No. 1, *supra*.

(5) S. 35—Abolition of Small Cause Court after a decree—Application for execution, where to be made—Jurisdiction how determined.

Where, after a decree in a Small Cause suit the Court of Small Cause is abolished, the decree-holder, wishing to execute the decree against the defendant, must apply for execution, under S. 35 of the Act, to that Court in which the suit, if instituted at the time of the application, should be instituted.

Where, in such a case, the jurisdiction is to be determined by considering the place of residence of the defendant, his residence at the time of application for execution is to be considered as his place of residence. **Kurella Chenchayya v. Poliseti Seetharamasawmi**, 30 M. 217.

WHITE, C.J., and MILLER, J.

(6) Arts. 7 and 13—Claim for poruppu and kulavettu.

A claim for *poruppu* does not fall within the prohibition in Art. 7 of the Act as a claim for apportionment of rent. It is not also clear that the claim for *kulavettu* falls within the prohibition enacted in Art. 13. **Seetharama Iyer v. Fischer**, 17 M.L.J. 487.

MILLER, J.

Reference :—27 M. 478, R.

(6-a) Art. 13—See No. 6, *supra*.

(7) Sch. II, Art. 35, cl. (g)—Suit for compensation for breach of contract of betrothal—Jurisdiction of Small Cause Courts—"Unclassed" suit, under S. 3 of the Punjab Courts Act—Appeal—Defect of jurisdiction—Interference of Chief Court.

A suit for compensation for breach of betrothal contract falls under Art. 35, cl. (g) of the Provincial Small Cause Courts Act. (a)

Such a suit is an "unclassified" suit, as defined in S. 3 of the Punjab Courts Act, and, if the value exceeds Rs. 100, a District Judge has no jurisdiction to hear and decide an appeal.

Where the inferior Court hears an appeal entertainable by a superior Court, the Chief

1.—Imperial Acts.—(Continued).

Act IX of 1887 (Provincial Small Cause Courts).—(Continued).

Court will not interfere, unless the defect of jurisdiction has actually prejudiced the party who complains of the want of jurisdiction. (b) **Hakim v. Ralya**, 125 P.R. 1907.=80 P.W.R. 1907.

RATTIGAN, J.

References :—(a) 132 P.R. 1889, *F*; 24 M. 652, *R*. (b) 96 P.R. 1902 (**F.B.**), *R*.

(7-a) *Art. 35 (i), Sch. II—Compensation for diversion of watercourse, suit for, whether cognizable by a Small Cause Court—Appeal from suit lies to divisional Court and not to District Judge—S. 39 (a), Punjab Courts Act, 1884—*

This was a suit instituted for compensation for diversion of a water-course, which, but for the forcible obstruction thereof caused by the defendant, would have flowed over to the plaintiff's land. Upholding the contention raised in revision, it was held that the claim was one covered by art. 34 (i) of the Act and was, therefore, not cognizable by a Small Cause Court. Held also, that, the suit being an unclassified suit of more than Rs. 100 in value, an appeal in the case would lie not to the District Judge but to the Divisional Court under S. 39 (a) of the Punjab Courts Act, 1884. **Lehna Singh v. Hira Singh**, 134 P.R. 1906=18 P.L.R. 1907.

LAL CHAND, J.

References :—18 M. 28, *F*.; 71 P.R. 1896, *R*.

(8) *Art 41—Contribution, suit for—joint decree—payment by one.*

Where one of several judgment-debtors discharged a decree for costs passed jointly against him and other judgment-debtors, and brought a suit for contribution, held, that the suit was a suit cognisable by the Court of Small Causes and was not excluded by reason of Art. 41 of the Second Schedule. **Roshan Lal v. Ram Lal**, 4 A.L.J. 548.=A.W.N. (1907), 230.

• BANERJI, J.

(9) *Art. 41—Scope of—Suit for contribution—debt due only by virtue of payment by the sharer—whether of small cause nature—S. 586, Civ. Pro. Code—Second appeal lies where subject-matter of suit exceeds Rs. 500—Test.*

Art. 41 of the Act applies only to a suit for contribution in respect of payment made

1.—Imperial Acts.—(Continued).

Act IX of 1887 (Provincial Small Cause Courts).—(Concluded).

by a sharer of money due from a co-sharer, and such a suit is exempt from the jurisdiction of Small Cause Courts. But it does not apply to a suit for contribution claimed in respect of a debt which becomes due only by virtue of such payment by the plaintiff, there having been no debt due from the defendant, the co-sharer, at the time the plaintiff made the payment.

In the latter case, as the suit is of the nature cognizable in a Court of Small Causes, no second appeal will lie under S. 586 of the Code, when the amount of the subject-matter of the suit does not exceed Rs 500.

In deciding whether second appeal lies from an order in execution in a suit of the nature cognizable by a Court of Small Causes, the test is not the amount claimed in the execution proceedings but the amount of the subject-matter of the suit. (a) **Mavula Ammal v. Mavula Maracoir**, 30 M. 212=17 M.L.J. 376.

WHITE, C.J., and MILLER, J.

Reference :—(a) 11 C. 169 *F*.

Act Y of 1888 (Inventions and Designs).

(1) *Ss. 14 and 29—Entry in register of inventions—Certified copies—Admissibility in evidence—Suit for infringement, maintainability of,—Licence—Burden of proof—Subsisting license—Defence open.*

Every entry in the register of inventions and every document entered and recorded in that register is a public document. Certified copies of these entries are admissible in evidence.

A licensee of a patent from the inventor is entitled to maintain a suit for its infringement.

When it is shown that a patent was granted, the burden of proving that it had determined lies on the defendant.

In a suit for infringement, it is not open to the defendant to plead that the invention was so obvious that no exclusive privilege ought to have been granted. **Sarnath Sanyal v. W. Butler**, 4 A. L. J. 11=A. W. N. (1907), 23.

BANERJI and AIKMAN, JJ.

(2) S. 29—See No. 1, *supra*.

Act VII of 1889 (Succession Certificate).

(1) *Object of the Act—Debts due to impartible estates—Necessity of succession certificates—Nature of succession to impartible estates.*

1.—Imperial Acts.—(Continued).**Act VII of 1889 (Succession Certificate).—(Continued).**

The Succession Certificate Act was passed principally for the protection of honest debtors. The debtor is entitled, before payment, to ask that the person demanding the payment should satisfy him either that he is, as the heir of the person who lent the money, entitled to receive payment, or that he is so entitled as having been an owner of the money, but before the death of the lender. In the former case, the succession certificate is the proper evidence.

A person succeeding to an impartible estate succeeds not as joint owner of the estate before his predecessor's death, but merely to the "effects" of his deceased predecessor. He is therefore bound to produce a succession certificate, before he can enforce the payment of debts due to his predecessor.

Semble.—An impartible zemindari devolving on the zemindar's decease upon one of the members of the family is assets in the hands of the latter, and the succession thereto is not by survivorship. (a) **Raja of Kalahasti v. Achigadu**, 17 M.L.J. 367. = 30 M. 454.

BENSON and MILLER, JJ.

References:—(a) 29 M. 453, discussed, 6 C.W.N. 879, 31 C. 224, 18 C. 151, 10 A. 272, 22 M. 283, R.

(2) S. 4 (1)—*Debt does not include rent—Court's jurisdiction to inquire whether debt is due.*

The word "debt" in S. 4 (1) includes any debt except rent. A Court granting the succession certificate is not competent to inquire whether a debt alleged by the petitioner is really due to the estate of the deceased, before granting the certificate. **Andalammal v. Yenkatacharlu**, 17 M.L.J. 257.

BENSON and WALLIS, JJ.

Reference:—28 B. 119, R.

(3) S. 9—*Disputed question of title—Duty of the Court.*

S. 7 of the Succession Certificate Act makes it incumbent on the Court to pass a definite order giving the certificate to one applicant or another with all convenient speed. If the question of title is in doubt, the Court should decide it on *prima facie* grounds to the best of its ability, give a certificate accordingly and take security. It should not refuse to adjudicate, because difficult questions arise or be-

1.—Imperial Acts.—(Continued).**Act VII of 1889 (Succession Certificate).—(Concluded).**

cause the matter is in issue in a regular suit. **Rukman Devi v. Sala Das**, 187 P.R. 1907.

JOHNSTONE, J.

Act VIII of 1890 (Guardians and Wards).

(1) *Santal Perganas—Same officer acting as District Judge and Deputy Commissioner at the same time—District Judge's power to appoint Deputy Commissioner as guardian.*

There is nothing in the Act to support the conclusion that the Deputy Commissioner, being in the position of the Collector in the Santal Perganas, is incompetent to apply as such for the appointment of a guardian to a minor under the provisions of the Act, even though the application would be to himself in his capacity of District Judge, nor is there anything to support the view that the District Judge is precluded from appointing the Deputy Commissioner as guardian of a minor, even though he himself may hold the latter office. In his two offices as District Judge and Deputy Commissioner, he has two distinct *personae* in the eye of law; and, in the latter capacity, when appointed as guardian, he is subject to the control of an authority different from himself as District Judge.

The sections in Ch. III of the Act apply to persons other than the Collector appointed as guardian. **Keshobati Kumari v. Satya Narain Singh**, 84 C. 569.

BRETT and SHARFUDDIN, JJ.

(2) Ss. 7, 47, 48—*An order by a District Judge under S. 7, if open to review.*

An order made by a District Court, under S. 7 of the Act refusing to appoint a guardian, is, under S. 47 (a), open to appeal to the High Court; but S. 48 provides—"save as provided by S. 47 of the Act and by S. 622 of the Code of Civil Procedure, an order under the Act shall be final and shall not be liable to be contested by suit "or otherwise." Held, therefore, that, under the wording in the above sections, the Legislature could not have intended that S. 622 of the Code should be applicable to such a case, since the words "or otherwise" necessarily precluded the notion that such orders were liable to be contested on review. **Farid v. Mitha**, 143 P.R. 1906 = 12 P.W.R. 1907.

RATTIGAN and LAL CHAND, JJ.

1.—Imperial Acts.—(Continued.)**Act VIII of 1890 (Guardians and Wards).—
(Continued.)**

- (8) *S. 8—Minor Hindu girl—Living with maternal grandmother—Father married again—whether a fit guardian.*

In an application for appointment of a guardian for a minor, the Court has really to see what is for the benefit of the minor. Where a Hindu girl, aged 10 years, had been living with her grandmother since the age of 5, the grandmother being in good circumstances, and it appeared that the father had married again, on an application being made by the father to be appointed guardian of her person, *held*, that the father should not, under the circumstances, have been appointed guardian of the person of the girl, and having regard to her welfare, she should be restored to the custody of the grandmother. **Bindo v. Shamal**, 4 A.L.J. 22=A. W.N. (1907), 24=29 A. 210.

KNOX and RICHARDS, JJ.

- (4) *S. 10—Guardian and minor—Paternal uncle or mother—See MAHOMEDAN LAW (GUARDIANSHIP), No 2, A.W.N. (1906), 256=29 A. 10.*

- (5) *S. 17—Hindu Law—Minors—Appointment of guardians.*

Matters to be considered by the Court in appointing a guardian under S. 17 of the Guardians and Wards Act, 1890, viz., the legal right to be appointed a guardian, the preference of the minors and the existing or previous relations, are very minor considerations as compared with the main question what order would be for the welfare of the minor.

In making orders appointing guardians for the persons of minors, the most paramount consideration for the Judge ought to be—What order under the circumstances of the case would be best for securing the welfare and happiness of the minors? With whom will they be happy? Who is most likely to contribute to their well-being and look after their health and comfort? Who is likely to bring up and educate the minors in the manner in which they would have been brought up by the parents if they had been alive? In fact, the main question for the Court to consider in the case of the unfortunate minors who have lost their natural guardian is, whom, amongst the relations, or for the matter of that, friends of the minors, can you select who will supply as nearly as possible the place of their lost parent or parents? The interest, well-being and happiness of

1.—Imperial Acts.—(Continued.)**Act VIII of 1890 (Guardians and Wards).—
(Continued.)**

the minors ought to be the main and paramount consideration for the Court in selecting the guardian of the person of a minor. **Re Guardian and Wards Act: Re Goolbai and Lilbai**, 9 Bom L. R. 923.

DAVAR, J.

- (6) *—S. 41, cl. 4—Guardian's liability to render accounts—Suit for accounts.*

Where a previous guardian failed to deposit the process fee, which he was required to put in, for the purpose of notice being given to the succeeding guardian to come in and inspect the accounts, and the Court has made no order declaring the previous guardian to be discharged under S. 41, cl. 4 of the Act, a suit lies for the purpose of calling upon the previous guardian to render accounts. The mere fact that the succeeding guardian has neglected to inspect those accounts, although they were lying in the Court for about a year, is no legal bar to the suit being maintained.

Although a question, as to whether certain properties, in respect of which accounts are claimed, really belonged to the estate of the minor or to the previous guardian personally, is a question of right, which cannot properly be gone into in such a suit, still, for the purpose of taking an account, it must be seen what are the properties, which the previous guardian took possession of, as guardian of the minor under the orders of the Court; and he is bound to render an account, in respect of all the properties, of which he received charge as such guardian. **Kaniz Fatima v. Sajjad Hosain**, 34 C. 211.

GHOSE and CASPERSZ, JJ.

- (6-a) *S. 47—See No.*2, supra.*

- (7) *Ss. 47 and 48—Indian Majority Act (IX of 1875), S. 3—Order made under the Guardians and Wards Act by a Judge in Chambers can be altered, rescinded or set aside—The period of minority does not extend to twenty-one years by the setting aside of such order.*

S. 48 of the Guardians and Wards Act is intended to give finality to contested orders, and to enact that, once an order is made, except as provided in S. 47 and saving the provisions of S. 622 of the Civ. Pro. Code, the order shall be final and shall not be contested

1.—*Imperial Acts.*—(Continued).

Act VIII of 1890 (Guardians and Wards).— (Concluded.)

by a substantive suit or by any other form of litigation.

The Guardians and Wards Act makes no provision for setting aside an order made under the Act. But, if such an order is made by the Judge sitting in Chambers, he has the power to vary, alter, modify, rescind, recall, or set aside, the order, if he finds that it is one that requires, in the interest of justice, to be dealt with in that way, or if he is satisfied that it is one that ought not to have been made.

If an order appointing a guardian is made, and subsequently, it is set aside, on the ground either that it was improperly obtained or erroneously made, and that it was an order *ab initio* and one that ought never to have been made, the period of minority, under the provisions of S. 3 of the Indian Majority Act, is not extended to twenty-one years. **Nagaradas Yutraj v. Anandrao Bhai**, 9 Bom. L.R. 495.

DAVAR, J.

(7-a) S. 48—See Nos. 2 and 7, *supra*.

(8) S. 52—Act IX of 1875 (Indian Majority Act), S. 3—Guardian and minor—Effect of appointment of guardian—Civil Procedure Code, S. 440.

Where a guardian has once been appointed under the provisions of Act VIII of 1890, the attainment of majority by the ward is postponed, until he reaches the age of twenty-one years, notwithstanding that the guardian appointed by the Court may be discharged before that time arrives. **Sadho Lal v. Murli-dhar**, A.W.N. (1907), 213 = 4 A.L.J. 597.

KNOX, C.J., and BANERJI and RICHARDS, JJ.

References:—21 B. 281, F; A.W.N. (1891) 118, D.

Act IX of 1890 (Railways).

(1) S. 67—Reserved accommodation—Waiver of benefit by Railway Company.

Under S. 67 of the Indian Railways Act, "fares shall be deemed to be accepted and tickets to be issued subject to the condition of there being room available in the train for which the tickets are issued." This is a provision introduced for the protection of the railway; and it is open to them to waive the benefit of this section. But they cannot be considered to have waived the protection, merely because they

1.—*Imperial Acts.*—(Continued).

Act IX of 1890 (Railways).—(Continued.)

allowed the plaintiff to take advantage of the rule which entitles five second-class passengers, in travelling together, to a reserved compartment when practicable.

The reserved compartment must be deemed to have been applied for and granted on the usual term that "reserved carriages in mail trains can only be provided when the load of the train permits."

So where the Railway Company did not provide the plaintiffs with a reserved carriage in a mail train, on the ground that the load of the train did not permit, it was held that the Company were not liable in damages. **Kommi-reddy Suryanarayanamurthy v. The Madras Railway Company**, 30 M. 417.

BENSON and WALLIS, J.J.

(2) S. 72—Duty of Railway Company as carriers—Burden of proof—S. 151, Contract Act.

A horse carried by the defendant Railway Company was injured on the way and died a few days after. The horse was not carried at the owner's risk, nor was it insured. The plaintiff, suing for damages, alleged in the plaint that the accident was due to a defect in the horse box, but failed to prove it. The suit was thereupon dismissed.

Held, on appeal, that the burden of proof lay upon the defendant Company, under S. 72 of the Railways Act, to prove that it discharged the duty of a bailee, under S. 151 of the Contract Act.

The burden would only be discharged by proof that the horse box was in all respects sufficiently fitted, and adequately secured, and that, on the journey, such precautions as ordinary prudence dictates were taken by the Company's servants (a).

The burden of proof cannot be affected by the fact that the plaintiff had put forward, and failed to make good, a theory of his own to account for the accident (b). **Babu Haridas v. The Agent or Manager of the B.B. and C.I. Railway**, 3 N.L.R. 94.

DRAKE-BROCKMAN, J.C.

References:—(a) 9 B.H.C. 1, 41 L.J.C.P. 268 and 22 A. 861, R; (b) 1 N.L.R. 4, F.

(3) Ss. 72, 74 and 75 (1)—Company's liability for loss of passenger's luggage.

1.—Imperial Acts.—(Continued.)

Act IX of 1890 (Railways) —(Concluded.)

A railway passenger, whose box, containing cloths, gold and silver ornaments and currency notes of the value of over Rs. 100, has been entrusted to the Railway Company's servants, for conveyance in the luggage van, and has been lost or stolen, cannot recover the value of the box or of any part of its contents from the Company, unless he had made the declaration prescribed by S. 75 (1) of the Act. The words "any parcel or package" in S. 75 (1) include passenger's "luggage" dealt with by S. 74 of the Act. Cl. (b) of the second schedule of the Act covers currency notes. **Alwaz v. Simla-Kalka Railway Company**, 73 P.R. 1907.

REID, J.

Reference:—56 P.R. 1897, R.

(3-a) S 74—See No. 3, *supra*.

(4) S. 75—Through-booking by steamer and rail—Liability for loss of goods—See **CARRIERS**, No. 3, 11 C.W.N. 1076.

(5) S. 75—Contract to carry partly by steamer and partly by rail—Consignor's omission to declare value and description of goods—Liability for loss of goods—See **CARRIERS**, No. 1, 34 C. 419.

(5-a) S. 75 (1)—See No. 3, *supra*.

(6) Ss. 77, 140—*Consignment—Over charge—Notice of claim—Statement of fact in a letter—Evidence.*

The plaintiff sued the defendant Railway Company to recover the excess amount claimed and received by the Company as carrier after the delivery of the goods to the consignee.

Held that the notice prescribed by S. 77 of the Indian Railways Act was necessary: the overcharge referred to in the section is not confined in its meaning to an overcharge recovered before the delivery of the goods to the consignee at their destination.

Held, also, that a letter under S. 140 of the Act must be an exact compliance with the terms of the section; it must, therefore, delivered to the agent at his office.

The statement of a fact in a letter is not proof of the fact itself. **Great Indian Peninsula Railway v. Devasi Versce**, 9 Bom.L.R. 942 = 81 B. 584.

RUSSELL, A.C.J., and BATTY, J.

(7) S. 140—See No. 6, *supra*.

1.—Imperial Acts.—(Continued.)

Act IV of 1893 (Partition).

(1) S. 4—"Dwelling house belonging to an undivided family"—Muhammadans.

Held that the expression "a dwelling house belonging to an undivided family" as used in section 4 of the Partition Act, 1893, is not applicable to a house belonging to a Muhammadan family. **Hashmat Ali v. Muhammad Umar**, A.W.N. (1907) 52 = 4 A.L.J. 209 = 29 A. 308.

KNOX and RICHARDS, JJ.

Reference:—13 A. 282, R.

Act I of 1894 (Land Acquisition).

(1) *Reference to Civil Court of question of apportionment of compensation money—Decision, if res judicata on question of title to other properties—Decree of High Court affirming decision—Leave to appeal to the Privy Council—Appealable value—Amount indirectly involved.*

A decision of the Court, with respect to the apportionment of compensation money, upon a reference under the Land Acquisition Act, should not be treated as *res judicata* affecting other parts of the claimants' property held under the same title (a).

When less than ten thousand rupees of compensation money was apportioned by the land acquisition Judge, and his decision was affirmed on appeal by the High Court.

Held, on an application for a certificate for leave to appeal to His Majesty in Council, that the case could not be regarded as indirectly involving a larger amount, because other properties not acquired were held under the same title. **Rai Bhaia Digaj Deo Bahadur v. Kali-Charan Singh**, 11 C.W.N. 525 = 34 C. 466.

MACLEAN, C.J., and FLETCHER, J.

References:—(a) 7 C. 406, F'; 20 M. 269, R; 12 C.484, D.

(2) Apportionment of compensation between landlord and tenant—See **LANDLORD and TENANT**, No. 17, 5 C.L.J. 662.

(3) Proceedings under—Property mortgaged converted into compensation money—Rights of mortgagee decree-holder—See **TRANSFER OF PROPERTY ACT**, No. 56, 6 C.L.J. 745.

(4) Ss. 3 (a), 8, 17, 18, and 23—*Acquisition of land with trees on—Compensation.*

1.—*Imperial Acts.*—(Continued).

Act I of 1894 (Land Acquisition).—(Continued).

In awarding compensation for land with trees on, a separate assessment of the compensation for the land and for the trees, respectively, is not necessary. The value of the trees is properly a part of the market value of the land. The word "land" in S. 3 (a) includes "things attached to the earth" and therefore trees, and this definition has to be applied to S. 23, unless there is something repugnant in the context.

S. 23, sub-sec. 1, cl. (2), refers to damage sustained by reason of taking the standing crops or trees, which may be on the land at the time of its being taken possession, and cannot, without a misuse of language, be applied to a case of purchase of land with trees upon it. In such a case, if the price is fair, no damage is sustained by each party. The clause may be applied to the case provided for in S. 17, when the Collector takes possession before award, and the owner of the land declines to accept the sum then offered as payment for the crops or trees taken, or it may also be applied to the case of crops or trees grown after the date of the declaration under S. 6, the date with reference to which the market value has to be estimated.

To read S. 23 (1), cl. (1) as referring to the bare land without trees, involves the difficulty that there is no provision in the Act for the separate assessment of compensation for buildings, apart from the land on which they stand.

As it is impossible to hold that they are liable to be acquired without payment of compensation, the word "land" in S. 23 must be taken to include "buildings standing thereon." If so "trees" must also be included in the word "land," as buildings as well as trees are "things attached to the earth." **Sub-Collector of Godavari v. Siragam Subbarayudu**, 16 M.L.J. 551=30 M. 151.

SUBRAHMANYA AYYAR and MILLER, JJ.

- (5) *Ss. 3, 9, 11—15, 22, and 23—Method of assessing compensation—Amount of claim—Market-value—Value of trees.*

Proceedings of the Collector under Ss. 11—15 of the Act are administrative, and not judicial. The proceeding before the Court under S. 22 is judicial, and therefore entirely distinct from the Collector's proceedings, and in no way a continuation of such proceedings. Being a judicial proceeding, the decision in it must be based on

1.—*Imperial Acts.*—(Continued).

Act I of 1894 (Land Acquisition).—(Continued).

evidence before the Court or on admissions made by the opposite party (a).

S. 23 of the Act renders it compulsory on a Judge to take into consideration certain matters there referred to, and to allow compensation for such of them as are admitted, or as he finds on the evidence before him to exist.

S. 25 of the Act renders it imperative upon a claimant to claim, in response to a notice under S. 9, compensation under every head on which compensation may be awarded under S. 23, although at the time he puts in his claim, he cannot know when the Collector will take possession of his land, and consequently cannot estimate what he should claim for damages, which have to be assessed in reference to that time.

Under cl. (a) of S. 3, "land" includes things attached to the earth, and so, in assessing the market-value of the land at the date of the declaration of intention to acquire it, the value of trees on the land at that date must be allowed for; but this must be included in the market-value of the land. The second head under S. 23 can only be taken to refer to such crops or produce as have been grown in the interval, from the date of declaration of intention to acquire to the date of actual taking possession. (b) **Shwe Gaung v. The Collector**, 4 L.B.R. 71.

FOX, C.J., and IRWIN, J.

References:—(a) 32 C. 605, F'; (b) 3 L.B.R. 117, R.

- (6) *Ss. 3, and 18—'Person interested'—Reference to Civil Court—Conflicting claims.*

In a certain Land Acquisition matter, the Collector apportioned the amount of compensation between the landlord and the tenants. Subsequently, another person appeared and claimed the amount apportioned to the landlord as the real landlord, alleging that the person, to whom the Collector had apportioned the money, was not the real landlord of the land acquired. The Collector, thereupon, referred the matter to the Court.

Held, the reference was validly made, and the Civil Court had jurisdiction to decide the dispute (a). **Rani Hemanta Kumari Debi v. Hari Charan Guha**, 5 C.L.J. 301.

BRETT and MOOREHEAD, JJ.

1.—*Imperial Acts.*—(Continued).

Act I of 1894 (Land Acquisition).—(Continued).

References :—(a) 17 A. 578, approved ; 7 A. 817, 7 C. 406, R.

(6-a) S. 6—See No. 4, *supra*.

(7) Ss. 6, 7, 11, 23, and 24—Collector's award—When final—Nature of proceedings prior to award—Bases for calculation of market-value.

Where an officer specially appointed, under the Act, for the purpose of acquiring land, makes merely a calculation, and also entirely leaves the question of compensation to be given to a portion of land undecided, and refers the case to the Deputy Commissioner, asking permission to allow the rates he has proposed, the reference of that officer is not an award at all. The award in such a case is the modified award of the Deputy Commissioner who has been also appointed, under S. 7, to make order for the acquisition, although such officer was not so empowered at the time of reference by the special officer.

The proceedings up to the Collector's award are not judicial, but merely administrative, and any deviation from the procedure prescribed in S. 11 of the Act will not render the proceedings *ultra vires* (a).

There are three methods of arriving at the market-value of agricultural land in this country, viz., Comparisons with recent sales of neighbouring lands, capitalisation of net profits, and valuation on the basis of land revenue (b).

Where the Government delayed the publication of notification under S. 6 of the Act for more than one year, and, where the market-value of the land increased during that period, on account of the fact that people knew of the intention of the Government to establish a civil station at that locality, held that, under S. 24 of the Act, the rise in price was merely speculative and the Court was not bound to take into consideration such increase of price, notwithstanding S. 23, cl. (1), under which the Court was to take into account the market-value of the land at the date of notification (c). **Farruk Shah v. The Secretary of State for India** Council, 68 P.R. 1907=88 P.W.R. 1907.

JOHNSTONE and RATTIGAN, JJ.

References :—(a) 80 C. 36 and 32 C. 605 (P.C.), F; 115 P.R. 1906, R; (b) 15 B. 279, R; (c) 90 P.R. 1905, F; 21 P.R. 1905, R.

1.—*Imperial Acts.*—(Continued).

Act I of 1894 (Land Acquisition).—(Continued).

(8) Ss. 6, 11, 14, 18 and 21—Issuing different declarations—Consolidation of claims—Onus of proof—Scope of the inquiry by the Judge—Principles of calculating the market-value of land.

The Local Government should endeavour to avoid issuing different declarations, under S. 6 of Act I of 1894 (Land Acquisition), for the acquisitions of portions of the same tract of land, when the declarations follow each other in rapid succession. The Collector and Judge should also try to consolidate claims for compensation as far as possible. The encouragement of piece-meal acquisition results in loss to all the parties concerned, including the Government itself.

Though the claimant must, on a reference under S. 18 of the Act, begin and thus start a case, showing that the Collector's award should not be accepted, the onus of proof varies according to the probative value of the enquiry made by the Collector under S. 11 of the Act. S. 14 gives the Collector powers to summon witnesses and to make an enquiry in the same way as a Civil Court would do in such a case. He is, also, bound, when a reference is made to the Judge, to state the grounds on which his award of compensation was based. If, however, he makes no enquiry or gives no ground for his valuation, the burden of proof on the claimant is nominal. The Judge must decide according to the weight of evidence irrespective of the questions of *onus probandi* and without throwing on the claimant an undue share of it (a).

S. 21 of the Act authorizes the Judge to confine his enquiry (into the valuation) to the interests of the persons affected by the reference under S. 18, but the section must mean the admitted interests. If there be any dispute as to the relative value of such interests, the total amount of compensation paid may be the subject of a case for apportionment, and the Judge should determine the total amount payable for the land, leaving the question of apportionment to be decided in a separate proceeding to be asked for by any of the parties.

The valuation of homestead lands is generally higher than that of agricultural lands, and it is well known that gardens and tanks are adjuncts of lands occupied as homestead in this country.

The different kinds of land must be differently valued, and the valuation must also vary

1.—*Imperial Acts.*—(Continued).

Act I of 1894 (Land Acquisition).—(Continued).

according to advantages or disadvantages as regards the river, the proximity of roads and railway communications.

The profit which might arise from the most advantageous disposition of land is one test for determining its market price (b).

The probable use of land in the most advantageous way, in accordance with, or following, the use already made of neighbouring lands, leads to speculative advances in prices, and regard should be had to such advances (c).

The utility of land is certainly an element for consideration in estimating its value, that is, the utility which may be calculated by a prudent business man (d).

If any person or company could and did pay a certain price for a block of a neighbouring land similarly situated and possessing similar advantages, with a view to some profitable disposition thereof, there is no reason why another block of lands, the subject of acquisition under the Act, should not be similarly valued.

The market-value of the acquired lands must be ascertained from recent instances of sale in the same or in the adjoining localities, and from the average rentals of these and similar lands in the neighbourhood.

In calculating the market-value of land, as deducible from instances of sales, the freehold of interests, including the interest of tenants and under-tenants, should be taken into consideration. If any sale relates to a permanent subordinate interest, the capitalised value of the landlord's interest should be added. If the calculation is to be made on the basis of income derived or derivable from the land sold, the profit realised by the person in actual occupation should be the basis of calculation. The rent realised by the tenure-holder of the lowest grade, may, also, occasionally, be the determining factor.

In sales of land for ordinary homestead purposes, the price may not be as high as what would be paid for factory purposes, but the general demand for land and the consequent reflex action on the prices of all classes of land cannot be gainsaid, and this factor should be taken into account in calculating the market-value of the lands under acquisition.

Where the land under acquisition are chiefly homestead and tanks, statutory rights, such as the rights of agricultural tenants generally

1.—*Imperial Acts.*—(Continued.)

Act IX of 1894 (Land Acquisition).—(Contd.)

are, do not debar the proprietors from getting the full benefit of their unearned increment. The actual assets of the land should be considered, and not merely the rents paid to the proprietors or any intermediate holders. **Fink v. Secretary of State for India**, 34 C. 599.

MITRA and CASPERSZ, JJ.

References:—(a) Judgement of 12th April, 1907, in appeal from original decree No. 264 of 1905. (b) 20 C. 103, R. (c) 28 I. A. 121, R. (d) 32 C. 343, R.

(8-a) S. 7—See No. 7, *supra*.

(8-b) S. 9—See No. 5, *supra*.

(9) Ss. 9, 12 and 18—*Railways Act (IX of 1890), S. 10, sub-sec. (2)*—*Acquisition of land for railway bridge—Acquisition proceedings—Irregularity—Waiver—Notice on persons interested—Requisites of a valid notice—injunction or damages—Ferry—Franchise, injury to exercise of—Compensation—Measure of damages—Capitalisation of present profits, if proper test of value.*

Notice under S. 9 of the Land Acquisition Act, inviting claims for compensation for lands acquired, should contain the material facts, which would enable the land-owner to identify the land.

Where the land is affected with a franchise, a description of the land simply, in the notice, is inadequate.

When a railway bridge has to be constructed across a river, the bed of which belongs to a private individual, a portion of the river-bed under the water has to be acquired and compensation paid for it. But such acquisition will not necessarily interfere with any existing ferry, unless the approaches to the ferry are also acquired, in which event the notice ought to specify that the ferry itself is intended to be acquired (a).

A notice under S. 9, specifying a shorter time than 15 days (as prescribed in cl. (2) of the section) for the appearance of persons interested in the land to advance their claims and objections, is illegal.

In order to give validity to a proceeding for the acquisition of land and finality to the award in which they terminate, the power of acquisition, with all the statutory limitations and directions for its use, must be strictly pursued, and every essential pre-requisite to

1.—*Imperial Acts.*—(Continued).

Act I of 1894 (Land Acquisition).—(Contd.).

the jurisdiction called for by the statute must be strictly complied with (b).

Notice under S. 9 is essential to the exercise of the Collector's jurisdiction. Where a Collector has omitted to take some step, which is essential to the validity of the proceedings, a waiver of the defect by the owner has to be clearly established and it must be shown that the owner acted with full knowledge of all the facts (c). There can, moreover, be no waiver when the owner appears and expressly reserves his legal rights (d).

Sub-sec. (2) of S. 10 of the Railways Act, does not bar a suit for compensation in the Civil Court, when the Collector refuses to adjudicate upon the claim put forward by the owner.

A suit will lie in the Civil Court, in respect of claims for damages, which could not have been foreseen at the time of the acquisition proceedings (e).

The owner of land sought to be acquired cannot obtain an injunction, merely because there has been a defective description of the land in the notice under S. 9. Where damages will adequately compensate for the injury, injunction will be refused (f).

The taking of property, which merely injures a franchise, but does not interfere with the exercise of it, does not entitle the owner of the franchise to compensation for damages to the franchise (g).

Therefore, the mere construction of a railway bridge across a river, whereby the profits of the ferry are reduced, does not entitle the owner of the ferry to claim damages.

Where, however, lands on both banks of a river, which were used as landing places for the ferry were acquired for the purpose of a railway bridge, the access to the river and, with it, the exercise of the franchise was destroyed and the owner, in consequence, became entitled to compensation (h).

The profits of a ferry being variable and liable to diminution, the damages in such a case ought not to be calculated by ascertaining the average of the profits at the date of the acquisition and capitalising the same. Allowance ought to be made for the diminution of profits by competition for which no damage could be claimed (i). **Maharajah Sir Rameswar Singh v. The Secretary of State for India in**

1.—*Imperial Acts.*—(Continued).

Act I of 1894 (Land Acquisition).—(Contd.).

Council, 11 C.W.N. 356 = 5 C.L.J. 689 = 34 C. 470.

MOOKERJEE and HOLMWOOD, JJ.

References:—(a) L.R. 4 C.P. 59 (1868), R. (b) (1906) A. C. 110 (1905), 5 N. Y. 484, 84 Canada Sup. Ct. 650, 14 App. Cas. 612, (1892) A. C. 493, 8 Peters 214, 70 Fed. Rep. 748, 48 Fed. Rep. 893, Baldwin 205, 3 Fed. Cas. 821, R. (c) 3 N. Y. 511, 53 A.M. Dec. 825, 137, Indiana 400 = 37 N. E. 157, 124 U. S. 581, R. (d) 25 N. J. L. 300, 6 Bom. H. C. (A.C.) 116, R. (e) 2 B. and S. 617. (1868) 16 Q. B. 648, 83 R. R. 645 (1851), 15 Beav. 322 (1851), 2 M. and W. 824 (1837), 11 App. Cas. 127 (1896), 30 I. A. 60, R. (f) 36 Kansas 170, 13 Pacific 2, 137 Illinois 145, 58 N. E. 412, R. (g) (1877) 2 Q. B. D. 224, 11 Lee (Tennessee) 731, 91 Tennessee 291, 18 S. W. 626, R. (h) 25 C. 346, 14 Q. B. 25, 80 R. R. 203 (1849), 2 K. B. 287 (1905), R. (i) 112 Missouri 361, 20 S. W. 563, 97 Maine. 185, 60 L. R. A. 856, (1894) A. C. 456, R.

• (9-a) S. 11—See Nos. 5, 7, and 8, *supra*.

(9-b) S. 12—See Nos. 5 and 9 *supra*.

(9-c) S. 13—See No. 5, *supra*.

(9-d) S. 14—See Nos. 5 and 8, *supra*.

(9-e) S. 15—See No. 5, *supra*.

(9-f) *Ss. 16 and 48—Recovery of compensation money by Government—Title to land reverts to the owner—Madras Forest Act V of 1882—Inclusion of land within reserve forest—Claim by the owner dismissed for default by Forest Settlement officer—Subsequent civil suit barred.*

Where the compensation money granted to a person, under the Land Acquisition Act, was recovered by the Government, on its finding that it was not necessary to acquire the land, it cannot be held that the title to the land continued to vest in the Government or that the Government continued to remain in possession.

Where the land, under dispute in a civil suit, was included in a block of land, which was constituted a reserve forest under the Madras Act V of 1882 and the claim of the owner of the land was dismissed by the Forest Settlement officer for default, and the claimant preferred no appeal against the order, held that the subsequent civil suit to establish the plaintiff's right to the land was barred by the decision of the Forest Settlement officer. (a)

1.—Imperial Acts.—(Continued.)

Act I of 1894 (Land Acquisition).—(Contd.).

Subrahmanian Asari v. The Secretary of State for India in Council, 17 M.L.J. 557.

BENSON and SANKARAN NAIR, JJ.

References:—(a) 12 M. 105, 20 M. 279, F.

(9-g) S. 17—See No. 4, *supra*.

(10) S. 18—*Assessment of value—How compensation to be awarded—Circumstances to be taken into consideration.*

The essential element to be taken into account, in determining the market value of land compulsorily acquired, is the fact of its probable user. In assessing the compensation, the umpire may and ought to take into consideration every circumstance, which is in existence, as a fact, at the moment when the notice to treat is given, and not only those circumstances, but also the probable user, which might be made of the property.

The way in which compensation should be awarded for land compulsorily taken, discussed. **In the matter of Government and Dayal Mulji**, 9 Bom. L. R. 99.

CHANDAVARKAR, J.

References:—26 B. 1, 15 B. 279, R.

(10-a) S. 18—See Nos. 4, 6, 8 and 9, *supra*.

(11) Ss. 18, 20, and 21—*Apportionment of compensation—Reference to Court—Objection taken before Court by person who did not object before Collector.*

Under sections 18, 20, and 21, all that the Court can deal with is the objection, which has been referred to it, and it is not open to the Court to go into the question raised, for the first time, by a person who had not referred any question or any objection to the Court under S. 18. A person, who did not raise any objection as to the apportionment of compensation made by the Collector, must be taken to have accepted the Collector's award in that respect. **Abu Bakar v. Peary Mohan Mukerjee**, 34 C. 451.

MACLEAN, C.J., and FLETCHER, J.

(12) Ss. 18, 20, and 21—*Reference to Special Judge—Scope of enquiry—Parties, addition of—after reference, Contesting award on matters outside the reference.*

In a reference under S. 18 of the Land Acquisition Act, it is not open to the Special Judge to go into questions raised by parties

1.—Imperial Acts.—(Continued).

Act I of 1894 (Land Acquisition).—(Contd.).

who did not object to the award and apply for a reference.

Where the reference under S. 18 related to a dispute regarding apportionment between parties A and B.

Held, that the Special Judge was wrong in allowing parties C and D to be added on their own application and contest the award on a ground not raised in the reference (a). **Govinda Kumar Roy Chowdry v. Debendra Kumar Chowdry**, 12 C. W. N. 98.

RAMPINI, C.J., and SHARFUDDIN, J.

Reference:—(a) 34 C. 451, F.

(13) Ss. 19 (d) and 23—*Market-value—Proof—Onus—Omission of Collector to state grounds—Effect—Calcutta Municipal Act (III, B.C. of 1899), S. 557—Bustee land—Valuation on the basis of best use, if permissible—Special Judge—Jurisdiction to assess compensation outside the limits of the declaration.*

The methods of valuation of land acquired under Act I of 1894 may be classified under three heads: (1) The opinion of valuers or experts, (2) the price paid within a reasonable time in *bona fide* transactions of purchase of the land acquired, or lands adjacent to the land acquired and possessing similar advantages, and (3) a number of years' purchase of the actual or immediately prospective profit from the lands acquired.

It is generally necessary to take two or all of these methods of valuation, in order to arrive at a fairly correct valuation. Exact valuation is practically impossible and the approximate market-value is all that can be aimed at.

Much reliance cannot be placed on the evidence of experts, unless it is supported by or coincides with other evidence.

The burden of proof is ordinarily on the claimant in the Court of the Special Judge, to prove that the valuation made by the Collector is insufficient. But the burden must vary according to the nature of the enquiry made by the Collector. If no evidence has been taken by the Collector, and if no reasons have been given in his decision to support his conclusion, the claimant has a very light burden to discharge. The *ipse dixit* of a Collector has very little weight and is not *prima facie* evidence of the correctness of his award.

1.—Imperial Acts.—(Continued).**Act I of 1894 (Land Acquisition).—(Contd.).**

The failure of the Collector, in making reference under S. 18 of the Land Acquisition Act, to state the grounds on which the amount of compensation was determined as required by S. 19, cl. (d), makes it incumbent on the Collector to justify the award before the Special Judge.

S. 557 of the Calcutta Municipal Act precludes any valuation based on the most advantageous disposition of land, *e.g.*, a valuation of *bustee* land, on the supposition of its adaptability for use as building land to carry expensive structures, which is the most advantageous use to which land can be put in Calcutta.

But the Collector and the Special Judge under Act I of 1894 have limited jurisdiction. They are bound by the official declaration in the local *Gazette*. The Collector cannot acquire or give possession of any land beyond the boundaries given in the declaration. If he does so, he commits an act of trespass. He has to find out the precise quantity of land notified for acquisition within specified boundaries, value the same under the provisions of the Act, and give possession accordingly. The Special Judge has to make similar enquiries. If the Local Government committed a mistake by giving an erroneous boundary, the Judge or Collector can not cure the mistake. If the land acquired be for Government purposes, and if the Government takes possession of land beyond the limits prescribed by the declaration or in excess of the area for which compensation is paid, it trespasses on private land and is liable under the law of the country; and so is a company, if the acquisition is for its purposes. But such excess land cannot be valued and compensation awarded for it under the provisions of the Act.

Harish Chunder Neogy v. The Secretary of State for India in Council, 11 C.W.N. 875.

MITRA and CASPERSZ, JJ.

(13-a) S. 20—See Nos. 11 and 12, *supra*.

(13-b) S. 21—See Nos. 8, 11 and 12, *supra*.

(13-c) S. 22—See No. 5, *supra*.

(13-d) S. 23—See Nos. 4, 5, 7 and 13, *supra*.

(14) Ss. 23 and 25—Collector—Award of compensation—The award binding on Government but not on claimant—Compensation—'Market value'—Valuation by a hypothetical scheme—Development of small areas—Questions of demand and supply—Allowance of ground-rent—Estimate of returns from buildings—Assessment of value

1.—Imperial Acts.—(Continued).**Act I of 1894 (Land Acquisition).—(Contd.).**

—Theory of economic rent—Frontage lands, valuation of—Brokerage fees, allowance of—Estimate on rental basis.

The result embodied in his final offer, by a Collector acting under the provisions of the Act, is binding on Government under S. 25 of the Act. But the Collector's deliberations concern the claimant no more than those of any private individual who makes an offer. They are not judicial, are not necessarily communicated and cannot affect the claimant's action. They cannot either estop Government or regulate or limit subsequent judicial inquiry.

Compensation is to be based on the value of the land to the owner at date of notice, and not its value after acquisition.

The phrase "market value" in S. 23 of the Act excludes from consideration all circumstances which would not affect the market as such, and the value is to be measured not by the standard of any individual's capacity.

The valuation by a hypothetical scheme can be open to reproach, merely because, it is a calculation of the advantages to be gained by the development of a particular land for a special purpose. In establishing the advantages so to be gained, the first essential is, to prove the existence of an adequate demand for land in the locality in question for the special purpose contemplated. If demand as the main factor in determining price is assumed, the hypothesis must be without foundation and worthless, and no doubt a Court must, in such a case, reject it as affording no basis for valuation. But if demand for the development proposed be established, then its effect on the price, evidenced by calculable returns, cannot be overlooked as a means of determining the probable value after full allowance is made for the cost of such development. It does not follow that because development is possible, it would pay. That must depend not only upon its cost but on the demand that can reasonably be expected when the development is completed. Reckless hypothetical development, irrespective of ultimate demand, is the real ground of objection to the employment of this method.

In dealing with small areas where development would create but a small additional supply, it may, without danger, be assumed that the additional supply would be readily absorbed by the general public. But when the development proposed is for a special purpose

1.—*Imperial Acts.*—(Continued).

Act I of 1894 (Land Acquisition).—(Contd.).

only, so as to appeal to a limited section of the public, and the development proposed is on a very large scale, the necessity for establishing the existence and extent of the demand increases in proportion to the extent of the area proposed for development.

The first question to consider is the question of demand for the supply which it was proposed to create in the hypothetical development. If that demand is proved, the sworn estimates and calculations of responsible professional men as to the cost cannot be dismissed *brevi manu*. They are entitled *prima facie* at least to examination. On the other hand, if the demand is not proved, the development would be wasteful and worthless, and would detract from, and not add to, the value of the property to be appraised; and in that case further examination into the details of the scheme would be unnecessary and would have to be abandoned.

Subject to the conditions above stated as to the necessity of establishing the fact of adequate demand, there is nothing essentially objectionable in the hypothetical method as a means of ascertaining market-value. This does not necessarily involve as a corollary, that it is the only method, or that it should be applied to the exclusion of the more direct test of actual offers and sale, showing the highest price offered, or given, for similar land, at the period in question, by prudent purchasers, in full consideration of the advantages to be obtained.

The utmost it is ordinarily safe to allow for the ground rent is one-sixth of the total rent, i.e., one-fifth of returns on bricks and mortar. This proposition being observed, if profits are six per cent. and land four per cent. the value of the land should be three-fifths of the outlay on bricks and mortar.

To estimate the returns from buildings, it is necessary first to estimate the demand for the buildings; for it is obviously unprofitable to build tenements which will not let. The demand ascertained as far as possible, the hypothetical scheme must be modified in accordance with it. The rates of the hypothetical rents, being admittedly reasonable, must be multiplied by the number of tenants reasonably to be expected, and then the capitalized returns minus the gross expenditure with the profits at ordinary rates will give the value of the land.

It is most unsafe to use the hypothetical method when dealing with large areas. The

1.—*Imperial Acts.*—(Continued).

Act I of 1894 (Land Acquisition).—(Contd.).

ordinary method ascertains the demand direct from the market. The enquiry stops there. The hypothetical method pushes the enquiry further back into the causes which would create demand in a reasonable market. The chief of such causes must be the *ultimate* demand the purchaser can reasonably expect for the use of the purchase. If in pushing back the enquiry, this cause of value is left unexamined, the hypothesis must be without foundation.

The method of assessing value, which is in accord with the theory of economic rent, is to deduct the building rent or profit rent from the aggregate net returns and capitalizing the balance. This method is subject to the condition that the aggregate net returns must be those from buildings which the site is "reasonably capable of receiving." The phrase "reasonably capable of receiving" limits the application of the test to cases in which the buildings do not exceed the demand for such buildings on that particular site.

The price of frontage land of the depth required for ordinary buildings is not a proper guide to the price of the rear land; and a rise in the former does not necessarily imply a corresponding increase in the latter. For the demand for frontage land is more than a mere demand for a building site. It is the demand for residence in a street with concomitant advantages. Streets are not made for isolated buildings, and back land is not ordinarily affected by a demand for residential quarters. The demand must be not merely for more building sites but for new streets and neighbourhoods, before it can have directly an appreciable effect on large areas of vacant back land.

One set of brokerage fees, that is to say, those payable on purchase, should be deducted, when the price is estimated by capitalising returns and deducting inevitable outgoings. But this is not necessary when the market price is known for the market has presumably already considered such items.

When the estimate is on the rental basis, the purchaser looks to the annual returns minus the outgoings as the value he gets for his money. If he does not look to those annual returns but only wants to sell again, then the value he expects to get is not estimated on the rental basis but upon the future market price which he speculates on obtaining from some third person, and in determining how far that future price will pay him, he must reckon

1.—Imperial Acts.—(Continued).**Act of 1 1894 (Land Acquisition).—(Contd.).**

on re-couping himself from it, for all expenses which that transaction would involve and therefore will not buy unless he thinks that, on re-sale, he can realise a price which will pay him back more than the market price at the date of purchase. **Merwanji Cama, In re**, 9 Bom. L.R. 1232.

BATTY, J.

(14-a) S. 24—See No. 7, *supra*.

(14-b) S. 25—See No. 14, *supra*.

(15) Ss. 30, 53 and 54—Reference to Civil Court for apportionment of compensation—Dismissal for default—Restoration—Sufficient cause—Civ. Pro. Code (Act XIV of 1882), S. 103, if applies.

S. 103 of the Civil Procedure Code applies to a reference under S. 30 of the Land Acquisition Act, the party, at whose instance the reference was obtained, occupying the position of the Plaintiff and his opponents that of Defendants (a).

Where the pleader engaged by the former^{*} could not attend owing to his wife's illness, and another gentleman, who had agreed to take up the case as his substitute, was unavoidably prevented from attending the Court, and there being three cases on the day's list above the case, the party himself did not anticipate that the case would be called at an early hour, and so failed to be present with his witnesses, at the time when the case was called;

Held, that these facts combined made out a case of sufficient cause for the re-admission of the case, but only subject to conditions.

The case was restored on condition of the defaulting party (appellant) paying beforehand to his opponents the costs of the hearing on the day on which the case was dismissed, the subsequent costs of the application under S. 103, C.P.C., and the costs of the appeal before the High Court. **Behary Lal Sur v. Nanda Lal Goswami**. 11 C.W.N. 430.

BRETT and SHARFUDDIN, JJ.

References:—(a) 7 C.W.N. 249=80 C. 86 and 25 A. 133, *approved*.

(16) S. 31—Portion of mortgaged property acquired for public purposes—Mortgagees, right to compensation awarded.

A mortgagee is entitled to take as much security as he can get for his money, and, when part of the land mortgaged is taken from him, his

1.—Imperial Acts.—(Continued.)**Act I of 1894 (Land Acquisition).—(Contd.).**

security is diminished *pro tanto*. Where, therefore, a portion of the mortgaged property is acquired under the Act for public purpose and the compensation awarded is less than the mortgage money, the mortgagee is entitled to the whole of the compensation in liquidation of the mortgage debt, the indivisibility of the mortgage attaching itself to the proceeds of the sale of the portion mortgaged, and the whole and each part of the land mortgaged being security for the whole amount advanced. **Topan Das v. Jeso Ram**, 17 P.R. 1907=67 P.W.R. 1907.

REID, J.

References:—20 C. 241, 16 A. 78, 13 M. 321, *It.*

(16-a) S. 48—See No. 9-f, *supra*.

(17) S. 53—See No. 15, *supra*.

(18) S. 54—See No. 15, *supra*.

Act XV of 1895 (Crown Grants).

(1) S. 3—Validity of grant by Government of an estate not recognised by Mahomedan Law.

A grant by the Crown for the maintenance of a tomb cannot be contended to be invalid, on the ground that it created an estate not recognised by the Mahomedan Law, as the Crown has, under S. 3 of the Act, power to make any such grant or transfer, "any rule of law, statute, or enactment of the legislature to the contrary notwithstanding." **Haji Mahomad Nasurudin Khan Bahadur v. Egambara Mudaly**, 2 M.L.T. 55.

* SUBRAHMANIA AYYAR and BENSON, JJ.

References:—32 I.A. 215, 2 M. 294, *R*; 18 M. 201, *D*.

Act II of 1899 (Stamp).

—See STAMP ACT.

Act IX of 1899 (Arbitration).

(1) Ss. 4 and 19—Application to file written statement, if step in proceedings under S. 19.

Taking out a summons, for further time, to deliver a written statement, is taking a step in the proceedings, within the meaning of S. 19 of the Arbitration Act (a).

S. 19 of the Arbitration Act examined and explained (b). **Sarat Kumar Roy v. The Corporation of Calcutta**, 11 C.W.N. 306=34 C. 443.

WOODROFFE, J.

1.—Imperial Acts.—(Concluded.)**Act IX of 1899 (Arbitration).—(Concluded.)**

References :—(a) L.R. (1896) Ap. Cas. 1 (1895), F. (b) (1895) 1 Q.B. 850, R.

(2) S. 19—*Jurisdiction of High Court to stay proceedings in the Court of Small Causes—Arbitration, reference to.*

The legal proceedings referred to in S. 19 of the Act do not necessarily mean legal proceedings in the High Court alone. S. 19 gives jurisdiction to the High Court to stay proceedings in any Court in the Presidency town subordinate to its jurisdiction. It does not indicate that the legal proceedings contemplated must, in the Presidency town, be proceedings in the High Court, and not any other Court subordinate to it in that town.

Proceedings taken by a party to a suit to stay legal proceedings under S. 19 are not steps "in the proceedings." **Ralli Brothers v. Noor Mahomed**, 8 Bom. L.R. 955 = 31 B. 236.

DAVAR, J.

References :—11 B. 467, 24 C. 778, R.

(3) S. 19—See No. 1, *supra*.

Act XXII of 1899 (Coinage and Paper Currency).

(1) See TENDER, No. 1, 5 C.L.J. 270.

2.—Bengal Acts.**Act X of 1859 (Recovery of Rent).**

(1) Ss. 27 and 108—*Registration of name—Suit, right of.*

The purchaser of a tenant's interest in execution of a money-decree has, under S. 27 of Act X of 1859, no *locus standi* to maintain a suit for possession of the tenure against a previous purchaser, who purchased it at a sale in execution of a rent decree obtained by co-sharer landlord under the Act, unless the former gets his name registered as a tenant in the *sherista* of one of the landlords. **Bichitrnanda Roy v. Behari Lal Pandit**, 5 C.L.J. 89.

BRETT and GUPTA, JJ.

(2) S. 92—*Execution, application for—Struck off—Second application, three years after the date of judgment—Continuation.*

The petitioner brought a suit against his tenant, the opposite party, for rent under the provisions of Act X of 1859 and obtained a decree on the 22nd January, 1903. On the 28th August, 1905, he made an application for execution of the decree, praying for the attach-

2.—Bengal Acts.—(Continued).**Act X of 1859 (Recovery of Rent).—(Concluded.)**

ment of both moveable and immoveable property. The Deputy Collector struck off the execution case, on the ground that it was more than six months old. On the 22nd February, 1906, the decree-holder put in another application, which was dismissed on the 9th April as barred under the provision of S. 92 of Act X of 1859:

Held, the application of the 22nd February, 1906, is one in continuation or furtherance of the former application of the 28th August, 1905, and hence the execution proceedings are not barred.

The word "issued" in S. 92 of Act X of 1859 should not have a strict legal interpretation put upon it. It means "sued out or applied for with success, that is, that no application for a process of execution shall be successful, unless the application for it is made, or it is sued out, within a fixed time" (a).

It is sufficient to save limitation under S. 92 of Act X of 1859, if the application for execution was made within three years from the date of the judgment (b). **Rajah Shyam Chandra Madra Raj Hari Chandan, Rajah of Nilgiri v. Inkallu Ram Prosad Bhuyan**, 6 C.L.J. 146.

BRETT and GUPTA, JJ.

References :—(a) 13 W.R. 3 (F.B.), F. (b) 3 C. 547 = 1 C.L.R. 149, F.

(3) S. 108—See No. 1, *supra*.

Act XI of 1859 (Revenue Sale).

(1) Sale of joint residuary estate, suit to set aside—Plaintiffs, respondents, death of one of several—Substitution not made within time—Abatement of appeal—See Civ. Pro. Code, No. 208, 5 C.L.J. 393 = 11 C.W.N. 504.

(2) Ss. 5 and 6—Collector issuing notice under S. 6 instead of under S. 5—Validity of sale—See CHOWKIDARI CHAKRAN LANDS, No. 2, 6 C.L.J. 99.

(3) Ss. 5 and 14—'Current year'—'Estate under attachment'—Appointment of common manager—Notice to co-sharers.

The words 'current year' in S. 5 of the Revenue Sale Law mean the official year (1st April to 31st of March), and not the calendar year (January to December).

An estate for which a common manager has been appointed by the District Judge, under the provisions of the Bengal Tenancy Act, is not an

2.—Bengal Acts.—(Continued).**Act XI of 1859 (Revenue Sale).—(Continued).**

'estate under attachment', within the meaning of Act XI of 1859.

The Collector is not by the Act bound to give notice to the co-sharers, under S. 14, of the declaration that the whole estate would be sold, if they did not pay up the arrear due from the defaulting sharer. All that is necessary under the Act is that the declaration should be made. It need not be notified. **Bhawani Koer v. Irshad Ali Khan**, 5 C.L.J. 425 = 34 C. 381.

HARINGTON and GEIDT, JJ.

References :—13 C.L.R. 1; 30 C. 1, and 21 C 844, *Refd. to*.

(4) *Ss. 10 and 11—Revenue Sale Law—Setting aside sale—Misjoinder of plaintiffs—Misjoinder of causes of action—Specification of share—Names of mouzas—Identification by purchaser—Inadequacy of price, whether due to irregularity.*

The *ejmali* share of a certain property was sold for arrears of revenue. A suit to set aside the sale was instituted by the co-sharers, some of whom alleged that the auction-purchaser had taken possession not only of the *ejmali* share, but also of certain defined shares belonging to them and in respect of which separate accounts had been opened in the Collectorate:

Held, it was clearly a misjoinder of parties and of causes of action. The cause of action with respect to the *ejmali* share accrued on the date of the Commissioner's order dismissing the appeal to him, and that, in respect of the other shares, on the date when the purchaser obtained possession of them.

In specifying the share of a property to be sold, it is not necessary to name all the mouzas that appertain to it. It is sufficient if the share be so specified that it can be identified and that it can be understood by intending bidders what is about to be sold. This is so, not only in the case of a share held in common as mentioned in S. 10, but also in that of a share consisting of specific portions of land as mentioned in S. 11 of the Act (a).

A defect in the sale notification is a mere irregularity which does not render the sale a nullity (b).

Property does not fetch the same price at a forced sale as it would do in a private sale; every purchaser at a revenue sale purchases property subject to the dangers of litigation and Courts

2.—Bengal Acts.—(Continued).**Act XI of 1859 (Revenue Sale).—(Continued).**

should not lightly set such sales aside, as by so doing they depreciate the value of property throughout the country.

If there is inadequacy of price, there must be direct evidence to connect inadequacy with the alleged irregularity in the sale notice, before a sale can be set aside. **Bajjnath Goenka v. Maharajah Sir Rayaneswar Prasad Singh Bahadur**, 6 C.L.J. 168.

RAMPINI and SHARFUDDIN, JJ.

References :—(a) 13 C. 203, *F.* (b) 21 C. 66 and 32 C. 111, *relied upon*. (c) 32 C. 509 = 1 C.L.J. 22, *F.*

(4-a) S. 11—See No. 4, *supra*.

(4-b) S. 14—See No. 3, *supra*.

(5) S. 25—Act VII, B.C. of 1868, S. 2—Sale set aside on appeal to Commissioner—Commissioner's power to review his own order—Jurisdiction—"Final," meaning of.

A Commissioner has no jurisdiction to review his own order setting aside the sale of an estate for arrears of revenue under Act XI of 1859, and an order of the Commissioner, affirming the sale, after he has once, rightly or wrongly, set it aside, is *ultra vires* and of no effect.

The word "final" in S. 25 of the Act, as amended by S. 2 of Act VII B.C. of 1868, must be interpreted as meaning at least "not open to review" (a). **Baija Nath Ram Goenka v. Nunda Kumar Singh**, 11 C.W.N. 803 = 6 C.L.J. 84 = 34 C. 677.

RAMPINI and SHARFUDDIN, JJ.

Reference :—(a) 22 C. 419, *approved*.

(6) *Revenue Sale Law (Act XI of 1859), Ss. 27, 28, 29, 37 and (Act VII of 1868, B.C.), S. 2—Appeal, time for preferring, to Commissioner of Revenue—Appeal presented after time, if legal and proper—Rejection of appeal by Commissioner as time barred—Civil Court, if, can re-open the question of limitation—Symbolical possession, effect of—Limitation—Transfer of possession—Incumbrance or under-tenure, if void or voidable—Registration of names, if constitutes possession—Possession follows title, rule of, when applicable—Possession, delivery of, effect of—Transactions fictitious, how established—Suit to annul incumbrance and for possession.*

The appeal contemplated by S. 2 of Act VII of 1868 B.C., must be preferred to the Commis-

2.—Bengal Acts.—(Continued).

Act XI of 1859 (Revenue Sale).—(Continued).

sioner not later than the sunset of the sixtieth day from the day of sale, reckoning that day as one of the sixty. An appeal preferred after the time so limited has expired, is not an appeal preferred within the meaning of S. 27 of Act XI of 1859 (a).

Quære:—Whether a Civil Court has power to deal with the question of the validity of the view taken by a Commissioner of Revenue that an appeal presented to him for setting aside a Revenue sale was barred by limitation (b).

Symbolical possession does not in any way affect the possession of, or give start to a fresh period of limitation against, persons who are not parties to the suit or execution proceedings. Constructive possession is operative only as against the person who is a party to the suit or proceeding, and is equivalent to a complete transfer of actual possession only as against him; this doctrine ought not to be extended to cases in which delivery is sought to be made operative, not only as against parties to the suit or proceeding, but also against strangers, on the ground that although not parties, they are bound by the result of the litigation which terminated in the delivery of formal possession (c).

An incumbrance or under-tenure is not *ipso facto* avoided by a sale of an estate for arrears of revenue, and is only liable to be avoided at the option of the purchaser at such sale, an option which may be exercised by the institution of a suit under S. 37 of Act XI of 1859, within the time allowed by law, or by actual ejectment by the Collector under S. 29; such ejectment, however, cannot be presumed merely because a writ has been issued by the Collector, and must be established by evidence like any other fact (d).

The mere registration of names under the Land Registration Act does not constitute possession in fact or in law.

When the title of a plaintiff is once established, his possession, however obtained, is possession within the meaning of Art. 142 of Sch. II of the Limitation Act, so that where a rightful owner of land is dispossessed, but succeeds in ousting the trespasser without recourse to law and continues in possession until dispossessed under a decree obtained by the trespasser under S. 9 of the Specific Relief Act, limitation runs against the true owner from the date of dis-

2.—Bengal Acts.—(Continued).

Act XI of 1859 (Revenue Sale).—(Continued).

possession under the decree in the possessory suit (e).

Transactions are to be pronounced fictitious, not merely on the ground of suspicion and doubt as to the truth of the case, but only upon legal grounds established by evidence (f). **Mir Waziruddin v. Lala Deeki Nandan and Syed Golam Barea v. Lala Deeki Nandan**, 6 C.L.J. 472.

MOOKENJEE and HOLMHOD, JJ.

References:—(a) 21 C. 76 (81), R. 16 C. 250, 7 A. 887, 23 C. 775, *Expl. and D.* (b) 25 C. 789, affirmed on appeal 33 C. 1178, R. (c) 11 C.L. R. 395, R. 5 C. 584, 16 C. 530, R. and *Expl.* 24 C. 915, 18 C. 520, 21 A. 269, R. (d) 9 C. 683, 31 C. 393, 5 C.L.J. 334, R. (e) 10 C.W.N. 1081=38 C. 821; 2 C.L.J. 1; 9 C.W.N. 1061. R. 1 App. Cas. 414, 2 Exch. 821=76 R.R. 796, *Expl. and D.* (f) 11 M.I.A. 28; 11 M.I.A. 551 (601; 14 M.I.A. 234, *R and F.*

(6-a) S. 28—See No. 6, *supra*.

(6-b) S. 29—See No. 6, *supra*.

(7) S. 37—*Purchaser of entire estate—Transferee from purchaser—Annulment of under-tenures—Entire lands covered by under-tenure—Taluqa Potta.*

The rights acquired by the purchaser of an entire estate at a sale for default of payment of revenue can be transferred and the transferee can avoid an under-tenure created before the sale, when the transfer is by a *taluka potta*, conferring upon the transferee the right to immediate possession of the lands comprised in the *potta* (a).

Where the lands held by the under-tenants include lands not claimed by the purchaser, and they hold the entire lands under one *potta*, their entire holding forms an indivisible tenure which cannot be annulled in respect of a portion only of the lands comprised in the *potta*. **Soocharam Barma v. Doorga Charan Das**, 5 C.L.J. 264.

WHITE and MITTER, JJ.

(7-a) S. 37—See No. 6, *supra*.

(8) S. 54—*Separate accounts—Sale of a share of revenue-paying estate in possession of Hindu lady, as female heir—What interest passes—Reversionary interest, if an incumbrance.*

When a share in a revenue-paying estate, in respect of which a separate account had been

2.—Bengal Acts.—(Continued).

Act XI of 1859 (Revenue Sale).—(Concluded).

opened, was inherited by a Hindu lady from her father and was then sold for default in paying Government Revenue,

held—that the complete owner's interest, and not merely a life-estate in the share, passed to the purchaser.

The interest of a reversionary heir is not an encumbrance within the meaning of S. 51 of Act XI of 1859. **Banalata Dasi v. Monmotha Nath Gowami**, 11 C.W.N. 821.

BRETT and SHARFUDDIN, JJ.

Act VIII of 1865 (Bengal Rent Recovery).

- (1) *S. 6—Decretal amount, payment of—Sale—bona fide purchaser without notice—Mortgage by owner's son—Mortgagor's representative and execution-purchaser, binding against—Transferability of a holding.*

Under S. 6 of Act VIII of 1865, any payment of decretal amount, after an application for sale has been presented, must be made into Court. If the money is paid before the execution proceedings commenced, the sale in execution of a decree for rent is bad and held without jurisdiction. If the decretal amount is paid out of Court after execution proceedings began, the payment would not, under S. 6 of Act VIII of 1865, make the sale a nullity.

If the auction-purchaser be a *bona fide* purchaser for value without notice, then good or bad, the sale stands, so far as he is concerned, and the usufructuary mortgagee of the holding cannot recover possession as against him, but must seek other remedies.

Semble.—A mortgage, executed by the son of the owner of the holding, at a time when his father was alive, is, after the death of the owner, binding on the representative of the mortgagor as also on the execution-purchaser from the representative.

The question of transferability of a holding can arise as well between landlord and tenant, as between a tenant and a third party (a). **Ram Gopal Aditya Deb v. Rajan Sadagar**, 6 C.L.J. 48.

RAMPINI and SHARFUDDIN, JJ.

Reference:—24 C. 855, R.

Act VII of 1868 (Revenue Recovery, Bengal).

S. 2—Time for preferring appeal to Commissioner of Revenue—See ACT XI of 1859 (REVENUE SALE LAW, BENGAL), No. 6, 6 C.L.J. 472.

2.—Bengal Acts.—(Continued).

Act VIII of 1869 (B.C.).

S. 6—Submergence of occupancy holding—Non-payment of rent—Effect—See OCCUPANCY RIGHTS, No. 1, 6 C.L.J. 149.

Act VI of 1870 (Chowkidari).

- (1) *Resumption—Settlement with Zemindar—Putnidar, rights of—Village Chowkidars Act (VI of 1870. B.C.), S. 51.*

A, a Zemindar, granted to B a putni of all the lands of his estate, without any reservation of the chowkidari chakran lands. The chakran lands were resumed by the Collector and transferred to the Zemindar, who settled raiyats on them. In a suit for ejectment brought by the putnidars,

Held, (1) that B was entitled to the possession of the lands,

(2) that the resumption did not create any new title in A, so as to affect the rights of B,

(3) that, whether B was bound to pay any rent to A in addition to the assessment imposed by the Collector on the resumed lands, depended upon the mode in which the rent had been assessed upon the putni at its inception,

(4) that B was entitled to eject the raiyats settled by A on the resumed lands.

The nature of the chowkidari lands and the effect of their resumption explained (a). **Kazi Nawaz Khoda v. Surendra Nath De**, 5 C.L.J. 33=84 C. 109=11 C.W.N. 201.

RAMPINI and MOOKERJEE, JJ.

References:—(a) 33 C. 596, 4 C.W.N. 814, and 20 C. 708, *Distgd.* 1 C.L.J. 303 and 10 M.I.A. 16, F.

- (2) *Ss. 50 and 55—Resumption and transfer to zemindar—Chaukidari land if part of estate—Purchaser of estate at revenue-sale—Title to Chaukidari land—Regulation VIII of 1793, S. 41.*

When *Chaukidari Chakran* land is resumed and transferred to the Zemindar under S. 50 of Act VI of 1870 (B.C.), such land becomes detached from the parent estate and the Zemindar holds it under a different title from his other *malguzari* lands.

A purchaser of the parent estate at a revenue sale acquires no title in the resumed *Chaukidari* land.

S. 41 of Reg. VIII of 1793 has been impliedly repealed in districts or parts of districts, to which Bengal Act VI of 1870 has been made

2.—Bengal Acts.—(Continued).

Act VI of 1870 (Chowkidari).—(Continued).

applicable. **Kashim Sheikh v. Prosunno Kumar Mukerjee**, 10 C.W.N. 598 = 33 C. 596 = 5 C.L.J. 299.

MITRA and ORMAND, JJ.

- (8) S. 51—*Chowkidari Chakran lands—Resumption by Government—Resettlement with Zemindars—Settlement with putnidars—Putnidars, grant by, of a mokuwari lease to a person other than the former durputnidars—Putnidars, right of, to make such settlement—Contract between parties—Intention as expressed therein—Construction.*

The provisions of S. 51 of the Viliage Chowkidari Act (VI of 1870), while directing the transfer of the *Chowkidari Chakran* lands, save all contracts entered already with regard to those lands; and the Courts must look at the contract between the parties to see what the intention of the parties was, in regard to such lands.

Where a contract between the putnidar and the durputnidar provided, "that the Chowkidars shall, when called upon, perform the work of the mouza in the same way as they have been performing (such) works from before for the *Chowkidari Chakran* lands, but if, in the future, the Government on resuming the said lands settles them, then the putnidars shall have the full power to take settlement of the same," and, as a matter of fact, Government resumed the lands and made a settlement with the Zemindar, who in turn settled them with the putnidar, and he again with a third person, and not with the durputnidar:

Held, (on a construction of the contract) that the contract contemplated the probability of Government resuming the lands, that the putnidar had the right to lease the resumed Chakran lands to any person he thought fit, that he was not bound to settle the same with the durputnidars, and that the durputnidars had no right under the contract to insist upon a settlement of these lands with them. **Pursettum Bose v. Khetra Prasad Bose**, 5 C.L.J. 148.

MACLEAN, C.J., and MOOKERJEE, J.

- (4) S. 55—See No. 2, *supra*.

(5) S. 55—Selling land for arrears of chowkidari assessment of more than one year—See **CHOWKIDARI CHAKRAN LANDS**, No. 2, 6 C.L.J. 99.

2. Bengal Acts.—(Continued).

Act VI of 1876 (Chota Nagpur Encumbered Estate).

- (1) S. 10—*Jurisdiction—Lease of land lying outside Chota Nagpur—Question of law taken for the first time in second appeal.*

Where a certain estate in the district of Manbhum was taken charge of under the Chota Nagpur Encumbered Estates Act, and thereupon the manager proceeded to cancel under that Act a lease of land lying in the district of Bankura,

held that the Act had no application, inasmuch as the Act applies only to land in Chota Nagpur.

The High Court allowed this question to be raised for the first time in second appeal. **Ajodhya Nath Chowdhury v. Keshub Chandra Mukherjee**, 11 C.W.N. 1127.

RAMPINI and SHARFUDDIN, JJ.

Act VII of 1876 (Land Registration).

- (1) S. 55—*Land Registration dispute—Reference to Civil Court—Conditions to be satisfied before making reference—"Possession", meaning of—Mahomedan Law—Dower—Widow's right to hold property till dower paid—High Court—Revision.*

Before the Collector can order the name of an applicant to be registered as Proprietor of an estate or any interest therein under the provisions of the Land Registration Act, he must satisfy himself, that the possession of the estate exists in the applicant as alleged, or that a succession or transfer has taken place as alleged; and that the applicant has acquired possession in accordance with such succession or transfer, but not otherwise. The determination of the question of possession alone is sufficient when the applicant claims to have assumed charge as joint Proprietor on behalf of his co-sharers or as manager. When, however, the applicant claims to be proprietor by succession or transfer, the Collector has to satisfy himself on two points, namely, that the succession or transfer has taken place and that the applicant is in possession accordingly. If the succession or transfer is proved but possession is found against the applicant, his name cannot be registered, or conversely, if possession alone is proved, but the succession or transfer is not established, *i.e.*, if the possession proved is not attributable to the title set up, the application for registration must be refused.

2.—Bengal Acts.—(Continued).**Act VII of 1876 (Land Registration).—(Concl'd.)**

The first duty of a Collector, in a case of dispute, is to determine whether any person is in possession of the disputed interest. If possession is found to be with any person, the Collector has no jurisdiction summarily to oust him. He can determine the question of the right to possession or refer it to the Civil Court, only, when, upon investigation, no one is proved to be in possession.

Possession in S. 55, Land Registration Act, does not mean lawful possession, but actual possession which includes possession by receipt of rent, the possession of the tenant being in a sense the possession of the landlord.

When a Mahomedan widow has obtained possession of the undistributed property of her deceased husband lawfully, and, without force or fraud, she is *prima facie* entitled, as against the other heirs of her husband, to retain possession until her dower-debt or any portion of it which is due and unpaid is paid.

The jurisdiction which the Civil Court acquires upon a reference to it under S. 55 of the Land Registration Act is that of a Civil and not of a Revenue Court, and its decision is subject to revision by the High Court.

The ordinary rule is that where an aggrieved party has other remedy available, *e.g.*, by regular suit, the High Court is unwilling to interfere in revision, but, even if there be such remedy, the High Court may interfere in exceptional cases. **Musett. Umatul Mehdi v. Musett. Kulsom**, 12 C.W.N. 16.

BRETT and MOOKERJEE, JJ.

(2) Ss. 56 and 89—Dispossession.

The rejection of an application for registration under the Land Registration Act, does not necessarily constitute dispossession so as to entitle the defeated party to maintain a suit for recovery of possession; the effect of the order may be merely to entitle the party to sue for declaration of his title. **Shyamanand Das v. Raj Narain Das**, 4 C.L.J. 568 = 11 C.W.N. 180.

RAMPINI and MOOKERJEE, JJ.

(3) S. 89—See No. 2, *supra*.**Act II of 1877 (Cess).**

(1) *Ss. 2 and 4—Cess, new, imposition of, date of—Notification, date of—Publication, date of.*

2.—Bengal Acts.—(Continued).**Act II of 1877 (Cess).—(Concluded).**

A lease executed on the 18th June, 1877, contained the following clause: "Whatever new cess will be imposed by the Government on the said lots will be borne by you (lessee)." The notification as to imposition of Public Works Cess in the Calcutta Gazette was dated the 6th June, 1877. It was published in the Gazette of the 18th June, 1877, and it was declared therein that the liability of property in certain District to pay Public Works Cess would accrue from the year beginning with the 28th June, 1877:

Held, that the lessee is liable under the contract to pay the entire amount of the Public Works Cess payable on account of the tenure as it was imposed from the 28th June, after the execution of the lease. **Bhola Nath Lahiri v. Chunder Madhub Ghose**, 6 C.L.J. 212.

MITRA and HOLMWOOD, JJ.

(2) S. 4—See No. 1, *supra*.**Act I of 1879 (Chota Nagpur Landlord and Tenant).**

(1) Ss. 123 and 125—See LANDLORD AND TENANT, No. 18, 11 C.W.N. 676.

(2) S. 125—See No. 1, *supra*.**Act IX of 1879 (Court of Wards).**

(1) Ss. 5, 35 and 51—Property not taken charge of—Litigation—Whether Manager of Court of Wards should be guardian or next friend of the ward—See CIV. PRO. CODE, No. 111, 5 C.L.J. 494.

(2) S. 35—See No. 1, *supra*.**(3) S. 51—See No. 1, *supra*.****Act VI of 1880 (Drainage).**

(1) *Ss. 42, and 44—Suit by landlord to recover from tenant certain drainage charges—Limitation—Time from which limitation runs—Bengal Tenancy Act (VIII of 1885), S. 3, Sub-section 5, Sch. III.*

Under S. 42 of the Bengal Drainage Act, the right of the landlord to recover from his tenant, any sum as drainage charges payable by him, accrues on the date on which the landlord has entered into an engagement with the Government to pay the sum assessed by the Commissioners appointed under the Act, and not on the date on which the Collector assesses the amount payable by the tenant under S. 44 (a).

Cl. (c) of S. 42 of the Act does not entitle the landlord to recover from his tenant in any

2.—Bengal Acts.—(Continued).**Act VI of 1880 (Drainage).—(Concluded).**

one year more than one-tenth of the total sum payable by him. **Naffer Chandra Maji v. Jyote Kumar Mukerjee**, 5 C.L.J. 19.

RAMPINI and MOOKERJEE, JJ.

Reference :—(a) 8 C.W.N. 640, followed and explained.

(2) S. 44—See No. 1, *supra*.

Act IX of 1880 (Road and Public Works Cess).

(1) S. 4, explanation, and S. 20 (a) and (b)—*Road-cess return*—Conversion of *nakdi* into *bhaoli* rent shortly before return submitted—Annual value how to be assessed—Alteration in area of holdings and tenures by reason of exchange amongst tenants, if must be specified in return.

The plaintiffs who had a share in a mouzab had their share separated by partition in 1800, F. S. Subsequently to the partition, the defendants who were tenants and were paying *nakdi* rent agreed to pay *bhaoli* rent from the beginning of 1802, F. S. It also appears that, after the partition, the tenants of the whole estate agreed amongst themselves to respectively hold lands in that share only in which they held homestead lands and in this way an exchange of lands took place between them. On the 4th of Assin 1302, F. S., the plaintiffs submitted a road-cess return in respect of their separated share, in which the *nakdi* rents which prevailed up to the end of 1801, F. S., and not the recently settled *bhaoli* rents were mentioned. Further the statement of land, holding or tenure given in the return corresponded with the state of things as they existed prior to the exchange effected between the tenants. Plaintiffs having sued the defendants for *bhaoli* rents calculated on lands held by them since the exchange, the defendants objected that the provisions of cls. (a) and (b) of S. 20 of the Act had not been complied with.

Held, that as there was no enhancement of rent but only conversion of *nakdi* into *bhaoli* rent and as no calculation of annual value based on the average money-value of three years' *bhaoli* rent as contemplated in the explanation to S. 4 of the Act was possible in this case, the plaintiffs had substantially complied with the provisions of S. 20, cl. (b) of the Act;

that cl. (a) of the section had also been complied with inasmuch as all the lands for

2.—Bengal Acts.—(Continued).**Act IX of 1880 (Road and Public Works Cess).—(Continued).**

which rent was payable were mentioned in the return, although it appeared that by reason of the exchange of lands amongst the tenants, the land for the rent of which each of the defendants was sued in this case was greater than that shown in the road-cess return. **Gouri Saran Mahto v. Mouli Mahomed Latif**, 11 C.W.N. 211.

RAMPINI and WOODROFFE, JJ.

(2) Ss. 4, and 41—*Mela*, profits of, if assessable, with road-cess—"Annual value"—"Rent"—"Tenure-holder"—*Stall-holders and vendors at mela*, if tenants or mere licensees—"Immoveable property" mela is—*Levy of cess over and above income-tax*, if legal.

It cannot be affirmed as a general proposition that the liability to pay income-tax carries with it as a necessary consequence exemption from Road and Public Works cesses. (a)

A *mela* is annually held for 20 days, from the 5th to the 25th Falgun, on lands, which are included in the *jotes* or holdings of agricultural tenants (but on which no crops are standing at the time the fair is held), under an arrangement between the zemindar and the holders of the *mela*, to which the tenants are not parties. The Collector assessed Road and Public Works cess, not only on the rents paid to the zemindar by the raiyats, but also on the profits realised by certain *ijaradars* under the *mela*-holders from the stall-holders and vendors of live-stock, etc., at the *mela*.

Held, that these profits are not rent payable by either cultivating raiyats or by other persons in the actual use or occupation of land, within the definition of 'annual value' in S. 4 of the Cess Act, and cannot be assessed with road-cess.

Per Rampini C.J.—The profits of a *mela* may come within the definition of rent paid for the actual use and occupation of land by persons other than cultivators, or of immoveable property as defined in S. 4 of the Cess Act. But whether in any particular case they do so or not will depend on the terms of the lease in that case.

Per Brett and Woodroffe, JJ.—A *mela* or fair does not come within the definition of immoveable property in S. 4 of the Cess Act.

The holders of the *mela* in this case or the *ijaradars* under them are licensees and not tenure-holders within the Act.

2.—Bengal Acts.—(Continued).

Act IX of 1880 (Road and Public Works Cess).—(Continued).

Per Rampini, C.J.—The definition of tenure-holder in the act is very wide and may include persons in the enjoyment of the profits of a *mela*. But whether in any particular case such persons are tenure-holders or not, will depend on the terms of the lease.

Per Brett and Woodroffe, J.J. (Rampini, J., and Mookerjee, J., contra)—The definition of "annual value" contemplates that the rent shall be payable by persons in occupation during the year, not by persons occupying the land for 20 days during each year.

Per Mookerjee, J.—The stall-holders and other persons attending the *mela* for the purpose of selling articles of merchandise are licensees and not tenants.

Per Rampini C.J.—The sums payable by stall-keepers may come within the definition of rent. **The Secretary of State for India in Council v. Karuna Kanta Chowdhury**, 11 C.W. N. 1053 (F.B.) = 6 C.L.J. 342.

RAMPINI, C.J., BRETT, MITRA, WOODROFFE and MOOKERJEE, J.J.

Reference:—(a) 28 C. 637, considered and expl.

- (3) Ss. 5, 6, 72 and 81—*Mine royalty*—Road-cess and Income tax, if leviable on the net profits derived from mines—"Annual net profits of mines," meaning of—"owner" of mines, meaning of—"owner" and "occupier," difference between—Return, notice to submit, on whom to be served—Return, liability of both to submit—Road-cess and income tax illegally levied, suit for refund of—"Sources of Income," meaning of—Income Tax Act (II of 1886), Es. 4 and 5—Bengal General Clauses Act (I of 1899, B.C.), S. 14 (2)—Civ. Pro. Code, S. 424—Notice to Government—Waiver—Estoppel—Objection taken at a late stage, if permissible—Construction and interpretation of statutory provisions, mode of—Procedure—Double taxation, if legal.

Royalty realised by an owner on the coal raised from his mines is "income" within the meaning of S. 4 of the Income Tax Act (II of 1886), and is not exempted from the operation of S. 4 by reason of the exceptions specified in S. 5 of the Act; and, as income, it is liable to be assessed with income tax (a).

2.—Bengal Acts.—(Continued).

Act IX of 1880 (Road and Public Works Cess).—(Continued).

Per Rampini, J.—The word "owner" in S. 72 of the Road-cess Act (IX of 1880 B.C.) is not restricted to the actual worker or the lessee of a mine. It is applicable to the proprietor of the land in which mines have been excavated and who is in receipt of a share of the annual profits in the form of royalty. The lessees under such proprietors, specially if they hold leases for only limited terms, cannot be considered the owners of the mines. The word "owner" used in the section is not necessarily the same person as the "occupier" and is not restricted to the "occupier."

A proprietor of land in which mines are situated and who is in receipt of royalties of a certain specified sum for the working of the mines is in enjoyment of annual net profits of mines and is as such liable to pay road-cess in accordance with the provisions of S. 6 of the Road-cess Act (IX of 1880, B.C.)

S. 72 of the Road-cess Act does not contemplate the service of only one notice on the owner or occupier of a mine, the submission of only one return by him, and the levying of only one assessment on the annual net profits enjoyed by him. The terms of that section read with S. 14 (2) of the Bengal General Clauses Act (I of 1899, B.C.) applies as well to two notices and to two returns as to one.

The submission of separate returns, having regard to Ss. 72 and 81 of the Road-cess Act, and the making of separate assessments on the "owner" and "occupier" are not necessarily illegal under, as they are not expressly prohibited by, the Act.

Per Mookerjee, J.—The subject is not to be taxed unless the language of the Statute clearly imposes the obligation, and in a case of reasonable doubt, the construction most beneficial to the subject is to be adopted (b).

The above rule, while valuable as a caution, cannot be taken as substantially varying the ordinary rules for construing all Statutes. The duty of the Court is in all cases the same, whether the Act to be construed relates to taxation or to any other subject, namely, to give effect to the intention of the Legislature, as that intention is to be gathered from the language employed having regard to the context in connection with which it is employed. The Court must ascertain the subject matter, to which the particular tax is, by the Statute,

2.—Bengal Acts.—(Continued).

Act IX of 1880 (Road and Public Works Cess).—(Continued).

intended to be applied ; but when once that is ascertained, it is not open to the Court to harrow or whittle down the operation of the Act by considerations of hardship or business convenience or the like (c).

The "annual net profits" from a mine is a quantity which is independent of the circumstance, whether the mine is worked by the owner himself or by lessees or adventurers holding the property under him ; the difference between the gross earnings and the working expenses which constitutes the net receipts is the net annual profits from the mine.

If the mine is worked by the owner himself, the whole of the net receipts is taken by him as the net profits. If the mine is worked by a lessee from the owner, the whole of the net receipts becomes divisible between landlord and tenant according to the terms of the contract which regulates their rights. In such a case, when the landlord takes a rent and royalty, the amount received by him represents a portion of the annual net profits from the mine, and constitutes, in fact, his share of the net profits from the mine ; and the royalty received by him is liable to be assessed with cesses ; and the balance left in the hands of the tenant constitutes his share of the annual net profits from the mine.

S. 6 of the Cess Act of 1880 makes the cess leviable upon the annual net profits from a mine, no matter whether such profits are taken entirely by the owner, or, are distributed between the owner and the lessee who is in actual occupation of the mine.

The Legislature contemplates, in S. 72 of the Act, the service of one notice and the submission of one return in respect of the whole of the net annual profits from the mine, and not in respect of any portion of the same.

The term "owner" in S. 72, is used in a limited sense ; it means an owner who is in possession of the mine or who has control over it, or in whom the mine is, for the time being, beneficially vested and who has the occupation or control or usufruct of it (d).

Quære, whether S. 424 of the Civ. Pro. Code is limited in its application to cases of what might be called torts or wrongs (e).

A notice, under S. 424 of the Code, is given for the benefit of the defendant and the inten-

2.—Bengal Acts.—(Continued).

Act IX of 1880 (Road and Public Works Cess).—(Continued).

tion of the Legislature is that the Secretary of State should have an opportunity of investigating the alleged cause of complaint and of making amends, if he thinks fit, before he is impleaded in the suit, and there is nothing to prevent the defendant from waiving the notice or from being estopped by his conduct from pleading the want of notice at the trial (f).

If the provisions of law are waived in the course of a trial, they cannot afterwards be set up by way of objection to any step taken or about to be taken upon the footing of the waiver ; when a litigant has, without mistake, induced by the opposite party, taken a particular position in the course of a litigation, he must act consistently with it, specially, if to allow him to do otherwise would be to prejudice his opponent.

Courts always look with disfavour upon double taxation and Statutes will be construed, if possible, to avoid double taxes (g).

But when legislative intent is clear and unmistakable, effect must be given to the statutory provisions on the subject. The question of double taxation is one of expediency for the consideration of the Legislature ; it cannot be affirmed as a matter of law that double taxation is forbidden (h). **Manindra Chandra Nandi v. The Secretary of State for India in Council**, 5 C.L.J. 148=34 C. 257.

RAMPINI and MOOREHEAD, JJ.

References :—(a) (1903) A. C. 299 (303), (1903) 1 K. B. 494, *R and expl.*; (1858) 3 H. and N. 769, *D* ; 28 C. 637 *Expl.*, and *D.* (b) (1880) 5 A. C. 842 (856), (1878) 3 A. C. 473 (478), (1897) A. C. 145 (152), (1900) A. C. 323 (337), (1869) L. R. 4 H. L. 100, (1844) 11 Cl. and F. 590 (602), *It.* (c) (1879) 4 App. Cas. 197 (202), 2 Q. B. 158 (164), *It.* (d) 46 L. J. Q. B. 559, 7 Ad. and Ell 124, 4 Exch. 163—80 R. R. 507, 3 Q. B. 449—61 R. R. 249, *It.* (e) 25 C. 239, *It.* (f) 14 M. and W. 199, 11 C. B. 563 (650), 9 Exch. 404, *It.* ; 25 A. 187, 45 Ch. D. 139, 23 C. 87, *D.* (g) 1 Q. B. 251, 117 U. S. 129, *It.* (h) 96 U. S. 97, 119 U. S. 265, 6 Sawyer 567—4 Fed. Rep. 366, 2 Clifford 512—24 Fed. Cases 1112, *It.*

(3-a) S. 6—See No. 3, *supra*.

(4) S. 20, application of—See **LAWLORD and TENANT**, No. 18, 6 C.L.J. 190.

(4-a) S. 20 (a) & (b)—See No. 1, *supra*.

2.—Bengal Acts.—(Continued).

Act IX of 1880 (Roads and Public Works Cess).—(Concluded).

(4-b) S. 41—See No. 2, *supra*.

(4-c) S. 72—See No. 3, *supra*.

(4-d) S. 81—See No. 3, *supra*.

(5) S. 95, applicability of—Admissibility of road cess returns—See EVIDENCE, No. 1, 6 C.L.J. 22.

Act III of 1884 (Municipal Act).

(1) Ss. 34 and 37—Lease taken in favour of Municipality—Execution—Validity.

S. 34 of the Bengal Municipal Act should be read with S. 37 of that Act.

Where, therefore, a Municipality purported to take a lease of lands involving a value exceeding Rs. 500, but the *Kabuliyat* was signed by the Chairman and was merely witnessed by two other Commissioners, but not signed by them as contracting parties, and further the document was not sealed with the common seal of the Commissioners.

Held—that the lease was not binding on the Commissioners. **The Chairman of the Municipal Commissioners of South Barrackpur v. Amulya Nath Chatterjee**, 12 C.W.N. 50 = 34 C. 1030.

RAMPINI, C. J. and SHARFUDDIN, J.

(2) S. 37—See No. 1, *supra*.

Act VIII of 1885 (Tenancy).

(1) *Rent suit—Instalment decree, power of Court to make—Civil Procedure Code, Ss. 210, and 622—High Court's power of revision.*

A decree for rent under the Bengal Tenancy Act cannot be made payable by instalments, S. 210 of the Civil Procedure Code not applying to such a decree.

Where a Munsif made an order for the payment of the amount of rent decreed by instalments, he committed an error of law only, and not an error in the exercise of his jurisdiction, within S. 622, Civil Procedure Code. **Shib Narain Mookerjee v. Baikuntha Nath Isar**, 11 C.W.N. 857.

MACLEAN, C.J., and FLETCHER, J.

(2) *Bengal Tenancy Act Amendment Act (III, B.C. of 1898), S. 9—Decision of Settlement Officer that land not held rent free—Rgs judicata—Decision under Ch. X of the Bengal Tenancy Act (VIII of 1885) before amendment.*

2.—Bengal Acts.—(Continued).

Act VIII of 1885 (Tenancy).—(Continued).

In a proceeding under Ch. IX. of the Bengal Tenancy Act before the passing of Act III, B. C. of 1898, the Settlement authorities found that lands claimed by the tenants as their rent-free lands were not rent-free and they accordingly assessed the same with rents.

Held—that, by the operation of S. 9 of Act III, B.C. of 1898, the Civil Court is precluded from adjudicating on the same matter. **Nalin Chandra Chakrabarti v. Maharaja Radha Kishore Manikya Bahadur**, 11 C.W.N. 859.

MITRA and CASPERESZ, JJ.

(3) *Revival of rights extinguished under Act VIII of 1869 (B.C.)—See OCCUPANCY RIGHTS No. 1, 6 C.L.J. 149.*

(4) S. 3, sub-sec. 5, sch. III—Suit by land-lord for recovery of drainage charges from tenant—Limitation—Time from which limitation runs—See ACT VI of 1880 (DRAINAGE, BENGAL), No. 1, 5 C.L.J. 19.

(5) *S. 5—Status of tenure-holder and raiyat, definition of, if exhaustive—Estoppel by conduct—Ejectment, suit for—Origin of tenancy—Raiyati holding or tenure—Tenancy, nature of—Landlord, dealings with tenant—Conduct—Holding, under letting of, to under-tenants—Right of occupancy.*

S. 5 of Act VIII of 1885 (Bengal Tenancy Act) defines the status of a tenure-holder as also of a raiyat, but neither the definition of a tenure-holder nor that of a raiyat, is exhaustive.

A person, who may have originally acquired a large tract of land, ostensibly with the object of cultivating it himself or by his servants or members of his family, may, by his conduct, afterwards, convert himself, so far as third parties (under-raiyats) are concerned, into a rent-receiver and give those persons, as against himself, the right to remain upon the land, without being liable to be ejected at his instance. **Mohesh Jha v. Manbharan Mia**, 5 C. L. J. 522.

AMEER ALI and PRATT, JJ.

(6) Ss. 5, 20 (3), 26, 79, 82, 85, and 178—Non-occupancy raiyati holding—Heritability—Custom—Contract.

Held by a majority of the Full Bench (Brett and Mitra, JJ., dissenting) that, under the Bengal Tenancy Act, the right of a non-occupancy raiyat is not heritable.

2.—Bengal Acts.—(Continued).**Act VIII of 1885 (Tenancy).—(Continued).**

Quære—Whether the right is heritable apart from the Act. **Mohunt Lukhan Narain Das v. Jainath Panday**, 11 C.W.N. 626 (F.B.) = 5 G.L.J. 457 = 34 C. 516 = 2 M.L.T. 219.

MACLEAN, C. J., HARRINGTON, BRETT,
MITRA and GEIDT, JJ.

- (7) *Ss. 17, 88, and 161—Permanent raiyati holding—sale of part—Landlord aware of sale, though transferee not recorded in his sherista—Suit for rent—Transferee necessary party—Sub-division of holding—Decree against recorded tenant, effect of—Purchase of part of tenure, if an incumbrance.*

When raiyats having permanent interest in a holding sold a portion of it and the transferees again sold a portion of their purchased interest to one R, and R obtained settlement from the landlord.

Held, that, although the transferees took no steps to get their names registered in the landlord's sherista and had paid no rent since their purchase, inasmuch as the landlord had notice of the purchase, under S. 17 of the Act, he was bound to bring a suit against the transferors and the transferees jointly.

A sale of the holding in execution of a decree for rent obtained against the transferors only did not therefore affect the transferees' interest in the holding.

The landlord was bound to recognise the transfer, though in the absence of his written consent as required by S. 88 of the Act, he was not bound to recognise the sub-division effected by the transfer.

The interest of the transferees was not an incumbrance which could be avoided by a purchaser at a rent sale. **Baistab Charan Chowdhry v. Akhil Chandra Chowdhury**, 11 C.W.N. 217.

GHOSE and GEIDT, JJ.

- (7-a) S. 20 (3)—See No. 6, *supra*.

(8) *Ss. 20 (4) and 21—Relinquishment by some co-tenants, effect of—Payment of rent—Person in possession as owner—Creation of tenancy—See LANDLORD and TENANT, No. 8, 5 C.L.J. 9.*

- (8-a) S. 21—See No. 8, *supra*.

- (9) *Ss. 22, 49 (b) and 85 (2)—Under-raiyat, ejectment of—Notice to quit.*

If a landlord (permanent tenure-holder) purchases from his occupancy raiyat title and

2.—Bengal Acts.—(Continued).**Act VIII of 1885 (Tenancy).—(Continued).**

interest in the holding by a deed of sale, he cannot, by virtue of such purchase, eject the under-raiyat, who was let into the land by the occupancy raiyat, without serving him a notice to quit under S. 49 (b) of the Act, even if the subletting was made without the landlord's consent and otherwise than by a registered instrument. **Amirulla Mahomed v. Nazir Mahomed**, 3 C.L.J. 155 = 34 C. 104.

GHOSE and PARGITER, JJ.

References :—28 C. 205, *Distd.* 31 C. 932 *Appr.*

- (9-a) S. 26—See No. 6, *supra*.

- (10) *Ss. 30 and 52—Joinder of causes of action.*

There is nothing in the law which prevents one suit being brought for enhancement under S. 30 and for alteration of rent under S. 52 of the Bengal Tenancy Act. The two causes of action may be joined in one suit. **Sarada Charan Chatterji v. Iswar Samli**, 11 C.W.N. 1154.

RAMPINI, C.J., and MITRA, J.

- (11) S. 49—Under-raiyat under an annual holding—Right of his heirs to inherit—See UNDER-RAIYAT, No. 1, 11 C.W.N. 519.

- (11-a) S. 49 (b)—See No. 9, *supra*.

- (12) *S. 50 (2)—Raiyat at fixed rates—Tenure-holder—Presumption—Onus.*

The presumption referred to in S. 50 (2) of the Bengal Tenancy Act arises only in suits brought under the provisions of that Act alone.

S. 18 of the Act does not make all the incidents of a permanent tenure applicable to raiyats holding at fixed rates, but only the provisions as to transfer and succession.

The onus of proving that he is a tenure-holder and not a raiyat, lies upon the defendant tenant, who alleges that he holds a permanent tenure. **Nilmani Maitra v. Mathura Nath Joardar**, 5 C.L.J. 413.

MACLEAN, C.J., and BANERJEE, J.

References :—12 W.R.P.C. 6 (17), 22 C. 742, R.

- (13) *S. 51—Suit for bhowli rent—Previous judgment between the parties allowing nakdi rent, whether res judicata—Record of rights, subsequent to the previous judgment, entry in, effect of.*

2.—Bengal Acts.—(Continued).**Act VIII of 1885 (Tenancy).—(Continued).**

Decision in a previous rent suit as to the amount of rent payable does not operate as *res judicata* in a suit for rent of subsequent years, although it may give rise to a presumption under S. 51 of the Bengal Tenancy Act (a).

The same principle should be applied to the question whether a tenant held at *bhowli* or *nakdi* rent for a particular period.

When a conflict arises as to the rate of rent, between that allowed by a previous decree and that entered in the record of rights subsequently prepared, both are to be considered together and weighed against each other.

Record of rights under Chapter X of the Bengal Tenancy Act are prepared with considerable formality, and the proceedings of the Revenue officers are conducted with publicity. Entries in such records should not be lightly discarded. **Kali Roy v. Pratab Narain**, 5 C. L.J. 92.

PRATT and ORMOND, JJ.

References:—(a) 6 C.W.N. 589 R., 32 C. 336, *Diss.*

(14) S. 52—*Additional rent for excess lands, when allowable*—S. 109, cl. (3)—*Appeal—Decision settling rent.*

A landlord is entitled to additional rent for excess lands, only when he shows (a) what the quantity of land was at the inception of the tenancy, (b) that the rent was settled with reference to the area, (c) that no consolidated rent for the entire area let out was settled, and (d) that the quantity of land held at the time of suit is in excess of that originally let out.

Where the decision of the Judge does not settle a fair and equitable rent, but merely proceeds on the ground that there was no excess land and, therefore, no rent to be settled, an appeal lies (a). **Rajkumar Pratap Sahay v. Ram Lal Singh**, 5 C.L.J. 588.

MOOKERJEE and HOLMHOOD, JJ.

Reference:—(a) 4 C.L.J. 188, *distinguished*.

(14-a) S. 52—*See* No. 10, *supra*.

(15) Ss. 54, 61 and 67—*Tender of rent—Refusal—Deposit in Court if essential to stop interest—Tender how kept good.*

Held, by a majority of the Full Bench (Rampini, C.J., and Mitra, J., *dissenting*) to stop interest on rent running in a case governed by the Bengal Tenancy Act, a tender of rent, which is improperly refused, need not be followed up

2.—Bengal Acts.—(Continued).**Act VIII of 1885 (Tenancy).—(Continued).**

by a deposit of rent in court under S. 61, and such a tender, if kept good, is sufficient to stop interest running from the date of tender.

A tender, which has been validly made and improperly refused, is kept good, if the person, who has made the tender, has from that time always kept the money ready to be paid on demand. (a) **Kripa Sindhu Mukerjee v. Annanda Sundari Debi**, 11 C.W.N. 983 (F.B.)= 6 C.L.J. 273.

RAMPINI, C.J., and BRETT, MITRA, WOODROFFE, and MOOKERJEE, JJ.

Reference:—(a) 2 P. Wms. 378, F.

(16) Ss. 55, 107, 109, 109 A and 192—*Payment of rent—Appropriation must be specific—Temporary Revenue settlement—Settlement of rent if can be made except upon application by landlord or tenant—Settlement affirmed by Special Judge—Finality—Res judicata—Contract Act, S. 59.*

The provisions of S. 55 of the Bengal Tenancy Act are very different from those of S. 59 of the Contract Act. Under S. 59 of the Contract Act, the Court may have regard, not only to the debtor's express intimation, but also to circumstances implying that the payment is to be applied to the discharge of some particular debt. Under S. 55 of the Bengal Tenancy Act, the debtor must declare the year, or the year and the instalment to which he wishes the payment to be credited. If he does not do so, the payment may be credited to the account of such year and instalment as the landlord thinks fit.

Where, by an arrangement between the landlord and the tenant, the latter paid a certain sum annually to Government on behalf of the former.

Held—that there was no appropriation of the amount so paid each year to the rent of that year within S. 55, Bengal Tenancy Act.

Quaere.—Whether, under S. 192, Bengal Tenancy Act, a Settlement Officer can settle the rent payable by the tenant to the landlord, except upon the application of the landlord or the tenant.

Where a tenant, in his appeal before the Special Judge against an order for the settlement of rent purporting to have been made under S. 192 of the Bengal Tenancy Act, did not take the objection that the settlement of rent was made contrary to the provisions of that section and without jurisdiction—and the

2.—Bengal Acts.—(Continued).**Act VIII of 1883 (Tenancy).—(Continued).**

decision of the Settlement Officer was affirmed by the Special Judge,

held—that the matter was *res judicata* and could not be re-opened in the Civil Court, owing to the operation of Ss. 107, 109 and 109 A of the Bengal Tenancy Act. **Mohim Chandra Roy v. Srimati Kalitara Debye**, 11 C.W.N. 939.

RAMPINI and WOODROFFE, JJ.

(17) *Ss. 58, 59 and 67—Interest—rent.*

The word "rent" does not necessarily include interest; so, if any sum of money be paid by a tenant to a landlord as rent, and the latter receives it as such, he cannot be permitted to apply that money towards any interest, which might then be due. **Bhagabati Debye Chowdhurani v. Basanta Kumari Debi**, 11 C. W. N. 110=5 C. L. J. 69.

GHOSE, C.J., and CASPERSZ, J.

References:—25 C. 571 and 22 C 575, *R.*

(17-a) *S. 59—See No. 17, supra.*

(18) *S. 61.*

The statutory provision for deposit of rent, under S. 61 of the Act, does not take away the effect of a tender validly made and kept good. **Jagat Tarini Dasi v. Nabagopal Chaki**, 5 C.L.J. 270=34 C. 305.

MOOKERJEE and HOLMWOOD, JJ.

Reference.—5 C.L.J. 192, *R.*

(18-a) *S. 61—See No. 15, supra.*

(19) *S. 67—Rent suit—Set off by tenant—Interest—See Civ. Pro. CODE, No. 79, 11 C.W.N. 215.*

(19-a) *S. 67—See Nos. 15 and 17, supra.*

(19-b) *S. 79—See No. 6, supra.*

(19-c) *S. 82—See No. 6, supra.*

(19-d) *S. 85—See No. 6, supra.*

(20) *S. 85, Cl. (2)—Under-raiyati lease—Term exceeding nine years—Validity—Suit for ejectment by raiyat—Notice.*

Cl. (2) of S. 85 of the Act has not been enacted merely for the protection of the superior landlord.

A sub-lease by a raiyat for a term exceeding nine years is invalid even against the raiyat (a). **Saratulla Mundle v. Kairunnessa Bibi**, 11 S. W. N. 190.

GEIDT, J.

2.—Bengal Acts.—(Continued).**Act VIII of 1885 (Tenancy).—(Continued).**

References:—(a) 20 C. 148 and 6 C.W.N. 377, *D.*

(20-a) *S. 85 (2)—See No. 9, supra.*

(21) *S. 87—Non-transferable holding—Transfer—Under-lease—Forfeiture—Landlord and tenant.*

A raiyat holding a non-transferable holding, having sold it to a third person, took an under-raiyat lease under him and refused to pay rent to the landlord of the raiyati holding who dispossessed him. In a suit by him to recover possession and for declaration of his title as an under-raiyat under the purchaser,

held, on a review of the authorities, that plaintiff's suit ought to fail; and it was accordingly dismissed. **Rajani Kanta Biswas v. Ekkari Das**, 11 C.W.N. 611=34 C. 689.

RAMPINI and SHARFUDDIN, JJ.

(21-a) *S. 88—See No. 7, supra.*

(22) *S. 93—Common manager, irregular appointment of—Suit to set aside appointment, maintainability of.*

A common manager was appointed under the Bengal Tenancy Act, in respect of property which was neither an estate nor a tenure. Some of the co-sharers, upon whom notice had not been served, sued to recover possession upon a declaration that the appointment was invalid:

Held, that the suit, as framed, was maintainable, and that it was not obligatory upon the plaintiffs to apply, in the first instance, to the District Judge, who had appointed the common manager. **Indu Bhusan Bose v. Annapurna Mitra**, 6 C.L.J. 216.

RAMPINI and MOOKERJEE, JJ.

(23) *Ss. 93, and 94—Common manager—Separate appointment for separate estates or groups of estates belonging to same co-owners—District Judge may reconsider question of necessity of appointment at any stage—Discretion, judicial—Position of co-owner who has separated his share, but not by metes and bounds.*

Where a District Judge made an order for the appointment of a common manager, in respect of several revenue-paying and revenue-free estates, of which the co-owners were not the same,

Held that the District Judge should have separately considered each property or group of

2.—Bengal Acts.—(Continued).**Act VIII of 1885 (Tenancy).—(Continued).**

properties belonging to the same co-owners and made separate appointments in regard to each property or group, though the same common manager might be appointed in all the cases (a).

Where, on being directed to deal with the case in the above manner, the District Judge, instead of starting proceedings *de novo* and issuing notices on the co-owners under S. 98, Bengal Tenancy Act, to show cause why a common manager should not be appointed, issued notices under S. 94 of the Act asking them to appoint a common manager,

Held, that, in the circumstances of the case, the proceedings should have been commenced *de novo* and the co-owners given an opportunity of showing that, owing to the altered state of things, there was no longer any necessity for appointing a common manager.

A District Judge can, in the exercise of his discretion, consider the propriety of the appointment of a common manager, whatever be the stage at which the proceedings may have arrived. This discretion is not, however, to be exercised arbitrarily but according to well established rules.

A co-owner, who has opened a separate account in the Collector's register or makes separate collection for his share, is, nevertheless, liable to have his share taken over by a common manager, although the dispute may not have extended to his share. His remedy, if any, is to have his share demarcated by metes and bounds. **Kumar Saradindu Roy v. The Collector of Rungpur**, 11 C.W.N. 1143.

MITRA and CASPERSZ, JJ.

Reference :—(a) 14 C. 659. F.

(28-a) S. 94—See No. 28, *supra*.

(24) *Before amendment by Act III of 1898, (B. C.), Ss. 104 (2) and 107—Decision of Settlement Officer settling rent, not res judicata, but evidence—Second appeal—Exclusion of evidence, an error of law—Civil Procedure Code (Act XIV of 1883), S. 584.*

Where a settlement of rent was made under S. 104 (2) of the Bengal Tenancy Act, before its amendment by the Amendment Act of 1898, the decision of the Settlement Officer had the effect of a decree under S. 107 of the Act (before amendment), and is evidence in a suit for rent subsequently brought by the landlord, even though it may not operate as *res judicata*.

2.—Bengal Acts.—(Continued).**Act VIII of 1885 (Tenancy).—(Continued).**

Where, in a rent suit, the Court of first appeal found as a fact that a certain amount was payable by the tenant as rent, *held*, that the High Court on second appeal can set aside the finding, when the Court of first appeal wrongly excluded the settlement proceedings from its consideration, and disregarded the evidence of road-cess returns filed by the tenants, and thereby committed errors of law. **Mohim Chandra Roy v. Srimati Kali Tara Debya**, 11 C.W.N. 1028.

RAMPINI, C. J., and WOODROFFE, J.

(25) *Ss. 105 and 106—Maintainability of suit to avoid intermediate tenures by lessee from Government—Conditions of the settlement—Record of rights, finality of.*

The defendants were recorded in the *khatian* of the cadastral survey as intermediate tenure-holders. The plaintiff did not take the remedy mentioned in S. 106 of the Tenancy Act. He subsequently took a settlement from the Government and is now the Zemindar. In a suit by him to avoid the tenures of the defendants,

held, that the suit is not maintainable. The settlement-holder is bound by the terms of his settlement to recognise intermediate tenure-holders mentioned in the settlement papers (a). **Tapanidhi Raghunath Puri v. Pitambar Gajendra Mahapaty**, 5 C.L.J. 67.

BODILLY and MITRA, JJ.

Reference. (a).—Unreported case decided by BANERJEE and PARGITER, JJ. on 8rd July, 1909.

(26) *Act VIII of 1885 (before amendment by Act I, B.C. of 1907), Ss. 105, 106 and 108—Record of rights—Entries as to character of holding and status of tenant—Correction of entries—Proper procedure.*

Before the passing of Act I, B. C. of 1907, an entry in a finally published record-of-rights that lands held by tenants were *mal lands* or that the status of the tenants was that of settled *raiya*s could not be corrected by the Settlement Officer, except in a suit instituted under S. 106, Bengal Tenancy Act. He had no authority to revise such an entry under S. 108 of the Act. **Shambhu Chandra Hazra v. Purna Chandra Pal**, 12 C.W.N. 122.

MACLEAN, C.J., and GEIDT, J.

(27) *S. 106—Suit between rival proprietors—Scope of suit—Question of possession—title—Limitation—Limitation Act (XV of*

2.—Bengal Acts.—(Continued).**Act VIII of 1885 (Tenancy).—(Continued).**

(1877), S. 22—*Substitution of executor in place of supposed legal representative—New defendant.*

In a suit under S. 106 of the Bengal Tenancy Act, certain lands were alleged to have been erroneously recorded as part of *mouzah P*, and it was prayed that the record-of-rights be amended and the disputed lands entered as part of plaintiff's own *mouzah R*, from the record of which the same had been omitted. The suit was instituted more than two months after the final publication of the record-of-rights for *mouzah R*, but within two months of the final publication of the record-of-rights for *mouzah P*.

Held, that the suit was not time barred.

In such a suit the Revenue Officer, and in case the suit is transferred to the Civil Court, the Civil Court, is confined to the question of possession, and cannot be asked to adjudicate upon the title of rival proprietors.

The suit was originally instituted against the person whose name was entered in the record-of-rights. But it appeared that this person was the widow of the deceased proprietor, and her name was entered as representing the estate of her deceased husband.

Held, that the executors to the estate of the deceased proprietor who were substituted as defendants were not new defendants within S. 22, Limitation Act. **Mohunt Padmalay Ramanuja Das v. Lukmi Rani**, 12 C.W.N. 8.

WOODROFFE and COXE, JJ.

(27-a) S. 106—See Nos. 25 and 26, *supra*.

(27-b) S. 107—See Nos. 16 and 24, *supra*.

(27-c) S. 108—See No. 26, *supra*.

(27-d) S. 109—See No. 16, *supra*.

(27-e) S. 109 A.—See No. 16, *supra*.

(28) S. 149—Onus—Suit for rents in deposit—Question of title—Judgment not operating as *Res judicata*—Value of judgment as evidence—See Civ. Pro. Code, No. 29, 11 C.W.N. 890.

(29) S. 153—*Co-sharer landlord—Separate landlord—Appeal.*

When a tenant has contracted to pay rent to one of several persons interested in a zamindari, in respect of his share separately from that of sharers, and such rent has been assessed out any reference to the rent payable to the other sharers and has been separately

2.—Bengal Acts.—(Continued).**Act VIII of 1885 (Tenancy).—(Continued).**

collected, the landlord is a separate landlord, and to a suit for rent brought by him to recover his rent, S. 153 of the Act applies. **Bhabatarini Das v. Ekabbar Malita**, 5 C.L.J. 285 (F.B.) = 2 M.L.T. 155.

MACLEAN, C.J., GHOSE, HARRINGTON, BRETT, MITRA, GEIDT and MOOKERJEE, JJ.

(30) Ss. 153 and 193—*Falker rent.*

Falkar rent is rent within the meaning of the Bengal Tenancy Act, and S. 135 is applicable to a suit for recovery of such rent. **Kanai Mahaldar v. Madhu Sudan Ghose** 6 C.L.J. 669.

MOOKERJEE, J.

(30-a) S. 161—See No. 7, *supra*.

(31) Ss. 166 and 167—*Occupancy-holding—Mortgage—Incumbrance, annulment of—Fraud.*

Where an occupancy-holding which had been mortgaged by the raiyat of the holding was purchased by a person in execution of a decree for money obtained by him, and the purchaser re-purchased it in execution of a rent decree against the old tenant for arrears which had accrued previous to his first purchase and annulled by a notice under S. 167 the mortgage of which he was aware at the time of his re-purchase.

Held, that the purchaser did not commit any fraud in re-purchasing the property and was entitled to annul the mortgage, and the mortgagor was not entitled to get a decree upon the mortgage making the holding liable for the mortgage debt.

That the purchaser was not bound as representative of the old tenant to pay off the decree for rent obtained by the land lord. **Surendra Mohan Singh v. Bansidhar Marwari**, 12 C.W. N. 114.

RAMPINI AND SHARFUDDIN, JJ.

(32) S. 167—*Sale of portion of tenure or holding—Annulment of encumbrances.*

Per Geidt, J., (before the reference).—S. 167 Bengal Tenancy Act, does not apply to a sale in execution of a rent decree of a portion only of a tenure or holding, and the auction-purchaser cannot proceed under that section, to annul encumbrances. **Ram Kinkar Biswas v. Akhal**

2.—Bengal Acts.—(Continued).

Act VIII of 1885 (Tenancy).—(Continued).

Chandra Chowdhuri, 11 C.W.N. 350=5 C.L.J. 242=2 M.L.T. 187. (F.B.)

M CLEAN, C.J., and HARRINGTON, BRETT, MITRA and GRIDT, JJ.

- (33) *Ch. XIV, S. 167—Single decree for rent of several tenures held by same tenant—Sale—Avoidance of incumbrance—Money-decree.*

When there are several tenures held by the same tenant, the landlord may institute one suit for the rent of all the tenures. But he cannot put the tenures to sale under the procedure laid down in Chapter XIV of the Bengal Tenancy Act, in execution of the decree obtained in such a suit, so as to enable the purchaser to avoid incumbrances under S. 167, Bengal Tenancy Act. A sale under the provisions of that Chapter can take place only when a separate decree has been obtained for the arrears of each tenure or holding and the same is sold separately in execution of such a decree. **Hridoy Nath Das Chowdhury v. Krishna Prasad Sircar**, 11 C.W.N. 497=84 C. 298=6 C.L.J. 153.

MITRA and CASPERSZ, JJ.

- (33-a) S. 167—See No. 81, *supra*.

- (34) S. 169—Rent—Interest—Pleading.

Where a landlord applied, under S. 169, cl. (c) of the Bengal Tenancy Act, for getting the rent and interest due to him, between the date of the institution of the suit and the date of the sale, from the surplus sale-proceeds, and the judgment-debtor raised no objection to it, but admitted the justice of the decree-holder's demand;

held that the decree-holder was entitled to get interest on rent.

Ghose, J.—Rent as used in cl. (c), S. 169, does not exclude interest. **Moharajadhiraaj Bejoy Chand Mohatab Bahadur v. S. C. Mookerjee**, 11 C.W.N. 1106.

GHOSE and CASPERSZ, JJ.

- (35) S. 169 (1) (c)—Surplus sale proceeds—Mortgagee—Transfer of Property Act (IV of 1882), S. 73—Landlord's claim preferential.

The landlord has a right, under S. 169, cl. (1), sub-clause (c), Bengal Tenancy Act, to have the rent due to him in respect of the tenure between the institution of the suit for rent and the date of the sale, paid out of the balance, before any sum can go to the judgment-

2.—Bengal Acts.—(Continued).

Act VIII of 1885 (Tenancy).—(Continued).

debtor or to his mortgagee. He has a preferential claim to that of the mortgagee of the holding, who stands in the shoes of the judgment-debtor. **Prabal Chandra Mukerji v. Jadupati Chuckerbutty**, 6 C.L.J. 26=84 C. 724.

MACLEAN, C.J., and HOLMWOOD, J.

- (36) S. 171—Withdrawal of money deposited, by landlord, effect of—Transfer—receipt of money from, by landlord—Estoppel—Silence.

It is the duty of the landlord, to challenge the title of the applicant, under S. 171 of the Bengal Tenancy Act, and to deny that he has any interest in the tenancy advertised for sale, or that the interest is of a description which would be voidable upon the sale. As his silence is prejudicial to the interest of the applicant, he is estopped from denying the latter's title later on (a).

If a party makes an application, on the allegation, that all the elements necessary to make a provision of law operative are present, and if this is denied, it is not only competent to the Court, but it is its duty, to investigate whether all the elements, which give jurisdiction, do, as a matter of fact, exist (b).

A receipt of money by a landlord from a transferee of his tenant may, under certain circumstances, amount to a recognition of the transfer (c).

No general rule can be formulated as to when silence may be unlawful in transactions between men at arms length. The presence of the silent party, when the transaction takes place, makes a much clearer case for estoppel than when he is absent. The main test to be applied is,—‘Whether the silence may be attributed as a true cause, not necessarily the entire or even main cause, but one of the causes, of the change of position, and whether upon due regard to all the circumstances, it is just that the defendants should be prejudiced in the manner in which they have been prejudiced by the omission of the plaintiff to speak.’

The doctrine of estoppel is invoked upon proof that a wrong has been done, or is threatened on one side, and injury suffered or justly to be apprehended, on the other; parties are only estopped from denying their own statements when the denial operates to the injury of another and when their conduct did influence the position of that person. Where a party fails to make his

2.—Bengal Acts.—(Continued).

Act VIII of 1893 (Tenancy).—(Continued).

rights known, where fairness and good conscience require that he should do so to protect the interest of others, he cannot be heard as against them to assert such rights. An estoppel may be set up as a means to prevent injustice, and if the circumstances are appropriate, the estoppel will be so moulded as to prevent fraud and injustice in whatever form it may present itself. **Thomas Barclay v. Syed Hossain Ali Khan**, 6 C.L.J. 601.

MOOKERJEE and CASPERSZ, JJ.

References :—(a) 23 C. 393 (396), 3 C.L.J. 67=38 C. 927 (941), *R.* (b) 7 W.R. 460; 18 W.R. 195, *R.* 2 C.W.N. 63, *D.* (c) 6 C.L.J. 122=11 C.W.N. 865=4 A.L.J.R. 570=9 Bom. L.R. 846, *R.*

(37) *S. 171—Right of depositor to obtain possession.—Procedure—Application or suit.*

Where a deposit is made under S. 171 of the Bengal Tenancy Act, the depositor can, as against the judgment-debtor, obtain delivery of possession of the holding advertised for sale, by application to the execution Court: but by such application the depositor is not entitled to invite the execution Court to oust a stranger to the proceeding. If he is met by a stranger, his remedy is by a regular suit for recovery of possession. **Ram Narain Routh v. Lal Das Routh**, 12 C.W.N. 55=6 C.L.J. 595.

MOOKERJEE and CASPERSZ, JJ.

(38) *S. 171—Payments made by subsequent mortgagees to save property from sale in execution of a rent decree, whether can be credited in taking accounts—See MORTGAGE (GENERAL), No. 16, 11 C.W.N. 403.*

(39) *S. 171, cl. (1) (c)—Depositor—Possession, delivery of.*

A person who has made a payment under S. 171 of the Bengal Tenancy Act, is entitled to be placed in possession of the tenure, upon application to the execution Court, and he is not bound to bring a regular suit to obtain possession.

An encumbrancer whose interest is not voidable, because the decree under execution is in favour of a co-sharer landlord and operates as a mere money decree, is not entitled to make a deposit and to obtain possession under S. 171 of the Bengal Tenancy Act. **Umatul**

2.—Bengal Acts.—(Continued).

Act VIII of 1885 (Tenancy).—(Concluded.)

Fatima v. Nemat Charan Banerji, 6 C.L.J. 592.

HARRINGTON and BRETT, JJ.

(39-a) *S. 178—See No. 6, supra.*

(39-b) *S. 192—See No. 16, supra.*

(39-c) *S. 193—See No. 30, supra.*

(40) *Sch. III, Art. 2 (b)—Suit for rent by a co-sharer landlord against some of several joint tenants—Limitation—Maintainability.*

Art. 2 (b) of Sch. III of the Bengal Tenancy Act applies to a suit for rent by a co-sharer landlord.

A suit for rent against some of several joint tenants is maintainable, as joint tenants are jointly and severally liable. **Jogendra Nath Roy v. Nagendra Narain Nandi**, 11 C.W.N. 1026.

RAMPINI, C.J. and SHARFUDDIN, J.

(41) *Sch. III, Art. 3—Dispossession by a person in his character of auction-purchaser, and not of landlord—See LANDLORD AND TENANT, No. 16, 5 C.L.J. 650.*

Act XII of 1937 (Bengal and N. W. P. Civil Courts).

(1) *Ss. 13 and 17—Jurisdiction—Transfer of district from one Judgeship to another pending an appeal.*

An appeal from a decision of the Munsiff of Kairana, in the district of Muzaffarnagar, was filed on the 3rd of October, 1904, in the Court of the District Judge of Saharanpur, which then had jurisdiction to entertain the appeal. But by a notification of the Local Government of the 24th of February, 1905, under the provisions of section 18 of Act No. XII of 1887, the district of Muzaffarnagar was transferred, with effect from the 1st of March following, from the Saharanpur Judgeship to the Meerut Judgeship.

Held, that, after the date when the notification above referred to came into force, the District Judge of Saharanpur had no jurisdiction to hear the appeal; also that the notification itself was sufficient authority for the District Judge of Saharanpur to transfer the record of the appeal to the Court of the District Judge of Meerut. **Jhandu Mal v. Pirthi**, A.W.N. (1907), 59=4 A.L.J. 218.

STANLEY, C.J., and BURKITT, J.

2.—Bengal Acts.—(Continued).

Act XII of 1887 (Bengal and N.W.P. Civil Courts).—(Concluded).

Reference :—28 A. 93, R.

(1-a) S. 17—See No. 1, *supra*.

(2) Ss. 20 and 21—Suits Valuation Act (VII of 1887), S. 9—Restitution of conjugal rights—Jurisdiction—Appeal.

An appeal from a decision passed by a Subordinate Judge, in a suit for restitution of conjugal rights, valued at less than one thousand rupees, lies to the District Judge, and not to the High Court.

In the absence of any rules framed under S. 9 of the Suits Valuation Act, the safest and the most convenient course to follow is to hold that, for the purposes of S. 21 of the Civil Courts Act, the valuation made by a plaintiff, in a suit for restitution of conjugal rights, should be *prima facie* considered as the true value (a). **Jan Mahamad Mandal v. Masher Bibee**, 11 C.W.N. 458=5 C.L.J. 400=34 C. 352.

MITRA and CASPERSZ, JJ.

References :—(a) 8 C.W.N. 705=31 C. 849, *diss*; 28 A. 545, 18 C. 292, 18 C. 378, R.

(2-a) S. 21—See No. 2, *supra*.

(3) S. 37—Beluchi Mahomedans governed by Mahomedan Law in regard to succession—See MAHOMEDAN LAW (SUCCESSION), No. 4, 4 A.L. J. 792.

Act I of 1895 (Public Demands Recovery).

(1) Ss. 8, 10 and 31—Notice under S. 10, service of—Sale, invalidity of, without notice—Notice, how to be served—Substituted service—Notice, condition precedent.

It is only, after a notice under S. 10 of the Public Demands Recovery Act has been issued and duly served, that the certificate acquires the force and effect of a decree, which may be enforced and satisfied by the sale of the debtor's property. If a sale has been held without service of such a notice, which is a condition precedent to the validity of the sale, it is without authority and must be set aside on that ground alone (a).

The service of notice under S. 10 must be effected in strict conformity with the provisions of S. 31 of the Act. Recourse cannot be had to substituted service, unless attempt has been made to effect personal service upon the judgment-debtor, and when the judgment-debtor cannot be found, upon an adult male member

2.—Bengal Acts.—(Continued).

Act I of 1895 (Public Demands Recovery).—(Continued).

of his family. Substituted service cannot be accepted as sufficient, unless it is proved that the conditions, under which recourse might be had to it, existed (b). **Jogeswar Sahu v. Debi Prasad**, 5 C.L.J. 555.

MOOKERJEE and HOLMWOOD, JJ.

Reference :—(a) 27 C. 698, F. (b) 3 C.L.J. 280; 1 C.L.J. 538; 33 C. 84, 1 C.L.J. 550, *followed*.

(2) Ss. 8 and 10—Certificate—Notice not served on judgment-debtor—Sale of immoveable property in execution of certificate—Jurisdiction—Suit to recover possession—Limitation—Limitation Act (XV of 1877), Sch. II, Arts. 12 and 142.

A certificate, if duly made and filed under S. 7 of the Public Demands Recovery Act, has, in so far as regards the remedies for enforcing it, the force and effect of a decree of a Civil Court, notwithstanding that notice may not have been served under S. 10.

But the service of notice under S. 10 is a condition precedent to the validity of the sale of immoveable property in execution of the certificate, and a sale held without the service of such notice is a nullity.

When it is found that notice has not been served under S. 10 of the Public Demands Recovery Act, and a suit is brought to set aside the sale of immoveable property held in execution of the certificate, and to recover possession, Art. 142, and not Art. 12 of Sch. II of the Limitation Act, is applicable. In such a suit, the plaintiff need not ask that the sale should be set aside. He is entitled to recover possession, upon the footing that the sale has not affected his title. **Furno Chandra Chattopadhyaya v. Dinobundhu Mukhopadhyaya** 11 C. W.N. 756 (F.B.)=5 C.L.J. 696=34 C. 811=2 M.L.T. 371.

MACLEAN, C.J., RAMPINI, BRETT, WOODROFFE, MOOKERJEE, JJ.

(3) Certificate—Notice under S. 10—Non-service—Civ. Pro. Code (Act XIV of 1882), Ss. 244 and 312—Limitation Act (XV of 1877), Sch. II, Art. 12—Certificate Officer of 24 Pergunnahs—Sale of immoveable property in Calcutta—Jurisdiction.

It is the due making and filing of the certificate under the Public Demands Recovery Act of 1895, B.C., amended by Act I of 1897, B.C.)

2.—Bengal Acts.—(Continued).

Act I of 1895 (Public Demands Recovery).— (Continued)*

which gives it the effect of a decree. Non-service of notice under S. 10 of the Act does not affect the validity of the certificate itself. Notice is required only to bind the immoveable property of the judgment-debtor, and non-service of notice is a mere irregularity. No suit lies to set aside a sale on the ground of non-service of notice. Such a suit is barred by Ss. 244 and 312 of the Civ. Pro. Code. If maintainable, it would be governed by Art. 12 of the Limitation Act (a).

The Certificate Officer of 24-Pergunnahs has jurisdiction to sell immoveable property in Calcutta under the Public Demands Recovery Act. **Haricharan Singh v. Chundra Kumar Dey**, 11 C.W.N. 745 = 34 C. 787.

WOODBROFFE, J.

Reference :—(a) 23 C. 775 (P.C.), examined and expld.

- (4) S. 10—Notice, non-service, effect of—Sale, nullity, suit to set aside—Limitation Act (XV of 1877), Art. 19—Civ. Pro. Code (Act XIV of 1882), S. 244, if bars a suit to set aside a certificate sale.

If a notice under S. 10 of the Public Demands Recovery Act has not been duly served, the certificate is illegal and void, and the sale based thereon is a nullity (a).

The person, whose property has been sold without service of notice under S. 10, is entitled to sue for recovery of possession within 12 years from the date of dispossession.

Where, by reason of omission to serve a notice under S. 10, there is no legal decree and no legal sale, a suit to set aside the sale and to recover possession of the property sold is not barred by S. 244 of the Civ. Pro. Code. **Elokeshi Das v. Abinash Chandra Bose**, 5 C.L.J. 698.

RAMPINI and MOOKERJEE, JJ.

Reference :—(a) 27 C. 698, F.

- (5) S. 10—Notice, non-service of—Limitation Act, Sch. II, Arts. 12, 120.

When no notice under S. 10 of the Public Demands Recovery Act was served, a suit to set aside the sale is not barred under Art. 12 of the Limitation Act; Art. 120 applies to such a case. **Sookan Sahu v. Lala Badri Narain**, 5 C.L.J. 686.

RAMPINI and CASPERSZ, JJ.

2.—Bengal Acts.—(Continued).

Act I of 1895 (Public Demands Recovery).— (Continued).

Reference :—1 C.W.N. 516, F.

- (6) S. 10—Notice, non-service of—Limitation—Signature, lithograph, inoperative—Purchaser, a third party—Valid sale.

A sale under the Public Demands Recovery Act was held on the 25th September, 1882; from that time until the 21st August, 1886, the owners and the purchaser were engaged, the first in impeaching, the other in vindicating the validity of the sale before the Collector, the Commissioner and the Board of Revenue. On the date last mentioned, the Board made the final order, by which the sale became final.

The suit to set aside the sale was brought on the 26th July, 1887 :

Held, that the plaintiffs were entitled to a deduction of the time between the 25th September, 1882, and the 21st August, 1886, and the suit was in time.

The form of procedure laid down in the Public Demands Recovery Act must be strictly followed. The Court must require them to be strictly followed, in the exercise of the powers conferred by it, without speculating as to their object at all.

When a property of very large value had been sold for a nominal price, the Court would not apply, in aid of the sale, the principle *ut res magis valeat quam pereat*.

When a certificate has not been signed by an officer authorised to sign it, there is no certificate duly made, and there is no valid sale.

When a certificate was not signed, but a lithographed signature was attached, the certificate was not duly signed as required by law.

When there was no certificate duly made, and no notice under S. 10 served, the sale must be set aside, even though the purchaser is a third party. No question of hardship arises, when a man has made a speculative purchase of a valuable estate for next to nothing. **Baij Nath Sahai v. Ramgat Singh**, 5 C.L.J. 697.

PIGOT and GORDON, JJ.

- (7) S. 10—See LIMITATION ACT, No. 56, 5 C.L.J. 385 = 34 C. 241.

- (7-a) S. 10—See Nos. 1 and 2, *supra*.

- (8) S. 19—Civ. Pro. Code, S. 311.

A suit to set aside a sale held under the Act on the ground that there were irregularities in

2.—Bengal Acts.—(Continued).**Act I of 1895 (Public Demands Recovery).—(Concluded).**

the Certificate proceedings, is barred under the proviso to S. 311 of the Code, when the plaintiff fails to prove that he has been injured by the alleged irregularities. **Jiwanram v. Hari Charan Singh**, 5 C.L.J. 240 (F.B.) = 2 M.L.T. 153.

MACLEAN, C.J., HARRINGTON, MITRA and GEIDT, JJ.

(9) S. 31—See No. 1, *supra*.

Act III of 1899 (Calcutta Municipality).

(1) Ss. 3, sub-sec. 37, 286, 336 and 341—*Verandah having pillars sunk down in soil between street and drain—Fixture—Encroachment.*

A verandah, adjoining a house, supported on pillars sunk down into the soil between the street and a drain which runs between the street and the house is a "fixture" and "an encroachment," within the meaning of S. 341 of the Act. **Corporation of Calcutta v. Imadul Huq**, 34 C. 844.

MACLEAN C.J., and HOLMWOOD, J.

(2) Ss. 15, 63 and 65—*Chairman's power to appoint officers drawing less than Rs. 200—Annual sanction—If appointment for more than a year, ultra vires.*

S. 15 of the Calcutta Municipal Act does not apply to appointment of Municipal officers and servants, whose appointments are expressly provided for under Ch. VI of the Act.

The power of appointing officers under S. 65 of the Act is vested in the Chairman; but such power is only co-extensive with the sanction of the General Committee, and such sanction must be given *annually*; and any appointment which exceeds this sanction is *ultra vires*. **Kedar Nath Bhandary v. The Corporation of Calcutta**, 11 C.W.N. 801 = 34 C. 863.

FLETCHER, J.

(2-a) S. 63—See No. 2, *supra*.

(2-b) S. 65—See No. 2, *supra*.

(2-c) S. 286—See No. 1, *supra*.

(2-d) S. 336—See No. 1, *supra*.

(2-e) S. 341—See No. 1, *supra*.

(3) S. 557—*Valuation of land*—See Act I of 1894 (LAND ACQUISITION), No. 13, 11 C.W.N. 875.

2.—Bengal Acts.—(Concluded).**Act VII of 1905 (Bengal and Assam Laws).**

Appeal against appellate decision of Divisional Judge, Sambalpur—See APPEAL (SECOND APPEAL), No. 1, 11 C.W.N. 956.

3.—Bombay Acts.**Act V of 1862 (Bhagdaree and Narvadaice)**

(1) *Bhagdar—Permanent tenant—Alienation of fruit of the trees on land—Land Revenue Code (Bombay Act V of 1879), S. 83—Permanent tenant, position of.*

There is nothing in the Bhagdari Act (Bom. Act V of 1862), to prevent a permanent tenant of a Bhagdar, from alienating the fruit of the trees on the land, of which he is a tenant, in the same way as he could alienate the crops or grass upon such land.

The position of a tenant—of a Bhagdari land—who is presumed to be a permanent tenant under S. 83 of the Land Revenue Code, 1879, is not affected in any way by the prohibition contained in the Bhagdari Act against alienation. **Nahanchand Devchand v. Kekhushru Edalji Modi**, 9 Bom. L.R. 50 = 31 B. 189.

RUSSELL, C.J., and BEAMAN, J.

Reference :—24 B. 31, R.

Act III of 1876 (Mamlatdars' Courts).

(1) *Possessory suit—Suit against Collector—Mamlatdar's jurisdiction to entertain the suit.*

A Mamlatdar's Court, under Bombay Act III of 1876, has no jurisdiction to try a suit to which a Collector is a party. **Motilal Virchand v. The Collector of Ahmedabad**, 8 Bom. L. R. 904 (F.B.) = 2 M.L.T. 13 = 31 B. 86.

RUSSEL, AG. C. J., and ASTON, BEAMAN and HEATON, JJ.

Reference :—23 B. 160 = 1 Bom. L. R. 414, *qualified*.

Act V of 1879 (Land Revenue Code).

(1) S. 37—See KHOTI TENURE, No. 1, 9 Bom. L. R. 719.

(2) S. 83—See ACT V OF 1862 (BHAGDAREE and NARVADAREE), No. 1, 9 Bom. L. R. 50.

(3) S. 84—*Annual tenancy—Determination—Notice by landlord.*

An annual tenancy, to which the Land Revenue Code applies, cannot be determined without a notice in writing by the landlord (or by the tenant.) **Oohhavlal Chandraprasad v. Gopal Kalyan**, 9 Bom. L.R. 1382.

SIR LAWRENCE JENKINS, C.J. and HEATON, J.

3.—Bombay Acts.—(Continued).**Act XVII of 1879 (Dekhan Agriculturists' Relief).**

- (1) *Ss. 12, 13 and 71-A—Retrospective effect—Enactment relating to procedure—Construction of statutes.*

Ss. 12 and 71-A of the Dekhan Agriculturists' Relief Act, 1879, do not apply to suits instituted, before the Act came into force, in the particular district in which the suits are instituted.

S. 12 of the Act must be allowed a retrospective effect, only in so far as it regulates the procedure of the Court. The portion of the section "and, secondly with a view to taking an account between such parties in manner hereinafter provided" must be denied a retrospective effect (a). **Fatmabibi Budruddin v. Ganesh Ballal Joglekar**, 9 Bom. L.R. 917 (F. B).

RUSSELL, A.C.J. and, CHANDAVARKAR, HEATON and KNIGHT, JJ.

Referencess :—(a) 8 Bom. L.R. 798, *Appr.*

(1-a) S. 13—See No. 1, *supra*.

(2) *S. 15-B—Decree for redemption—Power to order instalments—Interest provided by the decree cannot be subsequently cancelled.*

S. 15-B of the Dekhan Agriculturists' Relief Act, 1879, does not allow the Court to cancel a direction for payment of interest contained in the decree.

The section says that the Court, in the course of any proceedings under a decree for sale, may direct that any amount payable by the mortgagor under that decree shall be payable in such instalments, on such dates, and on such terms, as to the payment of interest, as it thinks fit. But the interest is as much payable under the decree as the principal, and the section does not say that the Court may direct that any amount payable under the decree shall not be payable; it merely empowers the Court to modify, in the particular manner there described, the terms of the payment. **Gokaldas Kala v. Govind Viswanath**, 9 Bom. L.R. 1334.

JENKINS, C. J., and HEATON, J.

(3) *S. 15-B—Power of Court as to payment of interest—Discretion.*

Sub-section 1 of S. 15-B of the Dekhan Agriculturists' Relief Act, 1879, does not make it compulsory on the Court to award interest. Under the section, there is a discretion in the

3.—Bombay Acts.—(Continued).**Act XVII of 1879 (Dekhan Agriculturist Relief).—(Concluded).**

Court as to whether or not interest shall be allowed. **Nath Lakshman v. Yazir Bhau**, 9 Bom. L. R. 550 = 31 B. 450.

JENKINS, C.J., and BEAMAN, J.

(4) *Ss. 15 B, and 20—Civ. Pro. Code (Ac XIV of 1882), S. 320—Decree—Execution—Execution transferred to Collector—Partial execution—Application for instalments—Limitation Act (XV of 1877,) Art. 175.*

A decree was passed for the sale of the mortgaged property and the execution was transferred to the Collector. The Collector sold some of the mortgaged property and ordered the rest to be sold. In the meantime, the Dekhan Act having been made applicable to the District, the judgment-debtor applied for instalments.

Held (1) that S. 20 of the Act does not apply to mortgage decrees :

(2) that the proceedings subsequent to the decree absolute for sale are proceedings under a decree for sale, within the meaning of S. 15 B, and, therefore, payment by instalments can be decreed :

(3) that the application having been made within one month after the Act came into force the point of limitation did not arise. **Mancherji v. Thakordas**, 8 Bom. L.R. 963 = 31 B. 120.

RUSSELL, C.J., and BEAMAN, J.

References :—23 B. 644 (652), and 7 B. 332, R.

(5) *S. 15 B—Decree—Instalments.*

S. 15 B of the Dekhan Agriculturists' Relief Act gives a discretionary power to the Court to make the decretal amount payable by instalments in the course of any proceeding in execution of a decree for redemption, foreclosure or sale. The power can be exercised by the Court *suo motu*; and at any time in the course of a proceeding. It is a power not subject to limitation. **Balaji Bhawanrao v. Datto Ramchandra**, 9 Bom. L.R. 1026.

CHANDAVARKAR and HEATON, JJ.

(6) S. 20—See No. 4, *supra*.

(7) S. 71 A—See No. 1, *supra*.

Act I of 1880 (Khoti Settlement).

(1) *Ss. 3 (5), 9 and 10—Khot—Occupancy tenant—Sale of occupancy rights—Resignation.*

3.—*Bombay Acts.*—(Continued).

Act I of 1880 (Khoti Settlement).—(Concluded).

An occupancy tenant by transferring his land on sale, does not resign it within the meaning of S. 10 of the Khoti Settlement Act, so as to place the land at the disposal of the Khot. **Ramachandra Ballal v. Dattatraya Vishnu** 9 Bom. L.R. 320=31 B. 267.

JENKINS, C.J., and BEAMAN, J.

(1-a) S. 9—See No. 1, *supra*.

(2) S. 10—Occupancy tenant—Resignation to Khot.

When an occupancy tenant transfers land to another on a sale-deed, he cannot, according to the ordinary usage or language, be said to have resigned the land. Though the consent of the Khot is not necessary to a resignation, still the resignation must be made to the Khot, and it is only to the Khot that the resignation can be made. As to whether or not a particular transaction is a resignation to the Khot must depend upon the circumstances of each case. **Badeshah Mahamadshah v. Narayan Anant Samant**, 9 Bom. L.R. 829.

JENKINS, C.J., and BEAMAN, J.

(3) S. 10—See No. 1, *supra*.

Act III of 1888 (City of Bombay Municipality)

(1) Ss. 3 (u), 222 and 504—Drains—Man-holes—Drains above the surface of ground driven through private property—Compensation—Award—Chief judge of the Bombay Small Cause Court.

A man-hole is included in the expression "any other device for carrying off sewage, etc." and falls within the term 'drain' as defined in S. 3 (u) of the City of Bombay Municipal Act, 1888.

The expression "the Commissioner may carry any municipal drain . . . into, through or under any land whatsoever within the city" covers a drain which is above the surface of the ground. The words "into, through or under" are meant to include drains passing over the land.

Reading Ss. 222 and 504 of the City of Bombay Municipal Act, 1888, together, it is plain that the object of the Act is that, if any damage is done or any portion of a man's property is taken away by the Commissioner's action under S. 222, the amount of compensation should be assessed under S. 504 of the Act, by the Chief

3.—*Bombay Acts.*—(Continued).

Act I of 1888 (City of Bombay Municipality).—(Continued).

Judge of the Small Cause Court, Bombay. **Dattaraya Balwant Chitnis v. The Municipal Commissioner of Bombay**, 9 Bom. L.R. 1821.

RUSSELL, J.

(2) Ss. 22, 23, 25, 33 and 34—Civ. Pro. Code, S. 11—The Municipal Act gives sole jurisdiction to the Chief Judge of the Small Cause Court in suits relating to election matters—Election suits not triable by other Courts—Election—Jurisdiction of Civil Court.

Where a special tribunal, out of the ordinary course, is appointed by an Act of legislature, to determine questions as to rights, which are the creation of that Act, then, except so far as otherwise expressly provided or necessarily implied, the jurisdiction of that tribunal to determine those questions is exclusive. It is an essential condition of those rights that they should be determined in the manner prescribed by the Act, to which they owe their existence.

The Chief Judge of the Small Cause Court at Bombay is the sole tribunal indicated under the City of Bombay Municipal Act, to determine questions relating to disputed elections. No other Court has jurisdiction to hear suits arising under the Act.

The word 'election' in S. 33 of the City of Bombay Municipal Act is designed to express something wider than a legally valid election. The words used in this section are consistent with the view that an election, which, in fact, took place, under conditions that made it possible that there should be a valid election, can be questioned.

There is enough in S. 33 of the City of Bombay Municipal Act, to bring it within the exception to S. 11 of the Civ. Pro. Code, and bar the cognisance of suits falling under the Act by any other Court. The jurisdiction of Courts can be excluded not only by express words, but also by implication. **Bhaishankar Nanabhai v. The Municipal Corporation of Bombay**, 9 Bom. L.R. 417.

JENKINS, C.J., and BATTY, J.

(3) S. 23—See No. 2, *supra*.

(4) S. 25—See No. 2, *supra*.

(5) S. 33—See No. 2, *supra*.

(6) S. 34—See No. 2, *supra*.

(7) S. 222—See No. 1, *supra*.

(8) S. 504—See No. 1, *supra*.

3.—Bombay Acts.—(Continued).**Act VI of 1883 (Talukdari Settlement).****(1) S. 31—Talukdar's estate—Interpretation.**

The expression "talukdar's estate" in section 31 of the Talukdari Settlement Act, 1888, means the estate held by the Talukdar as Talukdar.

It does not, therefore, include that which a Talukdar owns as assignee of a mortgage debt by a private investment of his money. **Khodabhai Sartansing v. Chaganlal Kishordas**, 9 Bom. L.R. 1122.

RUSSELL, AG. C.J., and HEATON, J.

Act II of 1906 (Mamlatdar's Courts).**(1) Enactment relating to procedure—Retrospective effect—Construction of statutes—Vested right in procedure.**

The Mamlatdar's Courts Act, being an enactment relating to procedure, should be given a retrospective effect.

No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner prescribed for the time being, by or for the Court in which he sues. **Gulam Rasul v. Balu Sayaji Chimbhar**, 9 Bom. L.R. 527.

BEAMAN, J.

(2) Jurisdiction of Mamlatdar over lands or premises in towns or cities—Possessory suit instituted under the old Act but judgment delivered after the new Act came into force—Jurisdiction.

On the 24th September, 1906, a suit was brought in the Mamlatdar's Court at Dohad for possession of a certain house in the town. Evidence was taken on the 22nd, 24th and 26th October. The judgment was delivered on the 17th November, 1906, and possession was given under the decree on the 29th November, 1906. In the meanwhile, on the 29th October, 1906, the Mamlatdar's Courts Act of 1906 came into force: it repealed the whole of the former Act of 1876 without any saving as to pending proceedings. The new Act restricted the jurisdiction of the Mamlatdar to "lands or premises used for agriculture."

Held, reversing the decree, that, after the 29th October, 1906, when the new Act received the sanction of the Governor-General, it must be held that the Mamlatdar's Court had no further jurisdiction with regard to houses in towns or cities. **Vajechand Ramaji v. Nandram Daluram**, 9 Bom. L.R. 1028=31 B. 545.

RUSSELL, A.C.J., and BATTY, J.

3.—Bombay Acts.—(Continued).**Act II of 1906 (Mamlatdar's Courts).—(Contd.).****(3) S. 19 (b)—Landlord and tenant—Determination of the tenancy—Trespasser getting into possession during the tenancy—Possessory suit against trespasser at the determination of the tenancy.**

The plaintiff let his lands to defendants Nos. 1 and 2 on the 5th June, 1905. In November, 1905, the defendants Nos. 1 and 2 were dispossessed by a trespasser, defendant No. 3. The tenancy ended on the 6th June, 1906. On the 29th October, 1906, the plaintiff filed a suit in a Mamlatdar's Court to recover possession of the lands from defendants Nos. 1—3. It was contended by defendant No. 3 that the Mamlatdar had no jurisdiction to try the suit so far as it affected her.

Held, that a trespasser like defendant No. 3 could not defeat the right of the landlord to recover immediate possession of the land on the determination of defendant No. 1 and 2's tenancy by resorting to the summary remedy given by the Mamlatdar's Courts Act, 1906;

(2) that the plaintiff's remedy having been to bring his suit under S. 19, cl. (b) of the Act, on the expiry of the tenancy, the fact that a trespasser got into possession during the continuance of the tenancy, but more than six months before its determination, is not sufficient to oust the Mamlatdar's jurisdiction.

The Mamlatdar's Act is a remedial measure and must be liberally construed so as to advance the remedy. **Deu Dada Gayli v. Sitaram Chimnaji**, 9 Bom. L.R. 1179.

CHANDAVARKAR and KNIGHT, JJ.

(4) S. 23—Crim. Pro. Code, S. 195, cl. 7 (3)—Perjury in a possessory suit—Sanction to prosecute not given by Mamlatdar—Appeal to District Judge—Collector has no jurisdiction to hear the appeal.

An appeal, from an order passed by a Mamlatdar, refusing sanction to prosecute for perjury in a possessory suit under the Mamlatdar's Courts Act (Bombay Act II of 1906), lies to the District Court.

The Collector has only the revisionary power granted to him by S. 23 of the Mamlatdar's Courts Act, 1906, for the limited purpose specified in the clause. He does not on that account become the principal Court of jurisdiction within the meaning of the expression as used in sub-cl. (3) of cl. (7) of S. 195 of the Code of Criminal

3.—Bombay Acts.—(Concluded).**Act II of 1906 (Mamlatdar's Courts).—(Concl'd.).**

Procedure, 1898. **Narayan Dhondiba v. Tukaram Govindshet**, 9 Bom. L.R. 896 (a).

CHANDAVARKAR and HEATON, JJ.

Reference :— (a) 5 Bom. L.R. 206, F.

4.—Central Provinces Acts.**Act IX of 1883 (Tenancy).**

(1) S. 43—Suit to recover arrears of rent from absolute occupancy tenant—See LIMITATION ACT, No. 84, 3 N.L.R. 81.

Act XI of 1893 (C. P. Tenancy).

(1) *Suit for recovery of arrears of rent—Personal remedy and real remedy—Their nature—Charge—Transfer of Property Act, S. 100—Limitation Act, Arts. 110 and 132.*

A landlord has two distinct forms of relief arising out of the relations existing between him and the tenant whose rent is in arrears, namely, a *personal* remedy, against the tenant, based on contract, and a *real* remedy against the holding. A suit for the personal remedy involves a claim for rent as such, and can only be maintained against those, who are personally bound by the contract of tenancy, namely, the tenant or some representative personally liable to pay the arrears. A suit for the real remedy follows the land, and lies against whomsoever, for the time being, having any interest in such land, irrespective of any representation of the defaulting tenant. The real remedy is a transformation of the claim for arrears of rent into one for money charged on land, which is sanctioned by the Central Provinces Tenancy Act, and is enforceable by a suit for sale under S. 100 of the Transfer of Property Act.

Therefore, a suit against the tenant for arrears of rent may, if properly framed, be one to obtain a personal decree as well as a decree for sale of the holding, subject to the law of Limitation. (a) The personal remedy is governed by Art. 110 of the Limitation Act, and the real remedy by Article 132 (b).

A suit against persons, to whom the tenancy is transferred by a private sale binding on the landlord, being a suit to enforce the real remedy, is governed by Art. 132 of the Limitation Act, **Singai Murdhar v. Lala Premnarain**, 3 N. L. R. 164.

STANFON, A.J.C.

4.—Central Provinces Acts.—(Continued).**Act XI of 1893 (C. P. Tenancy).—(Continued).**

References :— (a) 7 A. 502 (P.C.), R. (b) 3 N. L. R. 81, Diss. 16 C. P. L. R. 52; 26 A. 138; 26 A. 482; 29 M. 305, D. 26 M 730 (733); 13 C. P. L. R. 9; 9 C.P.L.R. 113; 14 C. P. L. R. 17, R.

(2) *Ss. 38 and 41 (3) (b)—Meaning of the word 'permit' in S. 41 (3) (b)—Absolute occupancy tenant selling holding—Notice to landlord—Effect of landlord's inaction for one month after notice—History of the tenant's right to transfer—Validity of reference to Select Committee's reports.*

The legislature, by enacting and re-enacting S. 38 of the Tenancy Act, 1883, intended to cut down, not the landlord's, but the absolute occupancy tenant's rights. The word 'permit' in S. 41 (3) (b) should be interpreted as merely equivalent to "suffer." Where an absolute occupancy tenant intends to transfer any right in his holding by sale and gives to his landlord a written notice of his intention, the landlord does not, by reason of his inaction for one month after receiving the notice, forfeit the right to recover an amount equal to the rent of the holding for one year. The right to receive any payment at all is recognised by reason of the landlord's paramount title in the land, and such recognition cannot be intended to lapse, if the landlord allows so brief a period as one month to pass without taking any action. The Select Committee's reports on an Indian Bill may be referred to to ascertain the *object* of the corresponding Act. **Seth Gangabishan v. Balmukund**, 3 N. L. R. 40.

DRAKE-BROCKMAN, J.C.

References :—22 C. 788 (799), 17 A. 498, 24 B. 484, 25 B. 269, *It.*

(3) *S. 41 (3) (b)—Suit for rent by the Mulguzar—Purchaser from tenant not liable in a suit for a simple money decree.*

In a suit by a Mulguzar, under S. 41 (3) (b) of the Act, for the recovery of one year's rent, in which an absolute occupancy tenant and his purchaser were made defendants, and where no attempt was made to make the rent a charge on the holding, *held* that, as the suit was for money only, no decree could be passed as against the purchaser.

Held also that, even where there is a contract between the vendor and the purchaser, to

4.—Central Provinces Acts.—Continued).**Act XI of 1898 (C. P. Tenancy).—(Continued).**

the effect that the purchaser must pay the year's rent, the Mulguzar, "being a stranger to the consideration, cannot enforce performance of the contract, by an action thereon in his own name, although he is the person intended to be benefited thereby, unless he is in the position of *cestui que trust*" (a). **Budha v. Atma Ram**, 3 N. L. R. 111.

BATTEN, A.J.C.

References:—(a) 11 C. P. L. R. 108, 14 C. P. L. R. 22, F.

(3-a) S. 41 (3), (b)—See No. 2, *supra*.

(4) S. 45—*Scope of the section—Applicability to leases not affecting proprietary rights.*

S. 45 of the Tenancy Act applies only to leases or other transfers of proprietary rights, in *sir* fields. It does not apply to agricultural leases, which do not affect the proprietary rights. **Bhagirathi Bai v. Anyaji Kunti**, 3 N. L. R. 159.

BATTEN, A.J.C.

Reference:—1 N. L. R. 32, R.

(5) S. 46—*Succession to occupancy holding.*

The law governing succession to the occupancy holding of a Hindu is the Hindu Law, subject to the exceptions created by Statute Law. S. 46 of the Act lays down such an exception, and its provisions are absolute and are not merely enforceable at the option of the landlord. **Rajai v. Fundi**, 3 N. L. R. 112.

BATTEN, A.J.C.

(6) Ss. 59 and 60—*Tenant of a malik makbuza—Nature of tenancy—Sale of the estate—Termination of the tenancy.*

Although the tenant of a *malik makbuza* is styled a sub-tenant in S. 59 of the Tenancy Act, he is a sub-tenant with a difference. He is a sub-tenant, in that he does not possess the privileges of an ordinary tenant, but his landlord is not a lessee, but the owner of the land. A *malik makbuza* has free liberty to transfer his right, and the sale of his rights is in no way analogous to an alienation by a tenant and does not necessarily determine the sub-tenancy. The purchaser can eject the tenant of *malik makbuza*, only in circumstances in which the original *malik makbuza* could have ejected him. **Sham Lal v. Kanhai Lal**, 3 N. L. R. 162.

BATTEN, A.J.C.

4.—Central Provinces Acts.—(Concluded).**Act XI of 1898 (C. P. Tenancy).—(Concluded).**

References:—6 C. P. L. R. 92, 93, 11 C. P. L. R. 5, 12 C. P. L. R. 158, R.

(8) S. 60—See No. 6, *supra*.

5.—Lower Burmah Acts.**Act IV of 1898 (Lower Burma Town and Village Lands).**

(1) S. 41—*Suit for eviction from house on village land—jurisdiction of Civil Courts—Title to house distinct from title to site.*

It is impossible to evict a person from a house, without evicting him from the occupation of the site, on which it stands. Such a suit for eviction is, therefore, one for occupation of the land as well as the house, and is essentially different from a suit for possession of the materials of the house. In the former case, the question of title to the house cannot be treated as distinct from the question of title to the house-site. Where the house stands on village-site, which is at the disposal of Government, S. 41 of the Act bars the jurisdiction of the Civil Courts to try a suit for possession thereof. **Maung Law v. Suppaya Padayachi**, 3 L. B. R. 256.

IRWIN, J.

Reference:—3 L. B. R. 165, R.

6.—Madras Acts.**Act II of 1864 (Revenue Recovery).**

(1) *Proceedings under the Act—Order confirming sale by Head Assistant Collector—Regulation VII of 1828—Finality of order unless revised by Collector.*

Where a Head Assistant Collector ordered the confirmation of sale, in proceedings taken under Act II of 1864, by virtue of the powers conferred on him by Regulation VII of 1828, his order was subject to revision by the Collector, but it was none the less a final order, unless and until it was revised, and it was the order by which the sale was confirmed. It was when the sale was confirmed, if at any time, that the party was aggrieved by proceedings taken under Act II of 1864, and the fact that it was open to him to move the Collector to revise the order of Head Assistant Collector does not postpone his cause of action until the decision of the Collector is passed. **Chinnamalachi Sattamuthu v. Saminatha Malayarayan**, 2 M. L. T. 328 = 30 M. 367.

BENSON and MILLER, JJ.

Reference:—26 M. 495, D.

6.—Madras Acts.—(Continued).

Act II of 1864 (Revenue Recovery).—(Contd).

- (2) Land registered in plaintiff's name, but belonging to and in the possession of the defendant—Voluntary payment of kist by plaintiff—Suit to recover kist amount—Contract Act, S. 69.

Where plaintiff sued to recover from defendant the amount paid by him, on account of the revenue due in respect of certain land, which stood registered in his name, but which belonged to the defendant and was in the latter's possession when money was paid, and it appeared that the plaintiff, taking advantage of his name being on the register, objected to the defendant being allowed to pay the kist, and insisted on the money being received from himself, held, that the payment by the plaintiff was voluntary and he could not recover the amount under the Revenue Recovery Act, as the payment was not made by him to obtain the release of the land from attachment, made or threatened, and as he was not a tenant, mortgagor or incumbrancer, as required by S. 35 of that Act. **Boja Sellappa Reddy v. Vridhachala Reddy**, 1 M.L.T. 323=16 M. L. J. 569=30 M. 35.

SUBRAHMANIA AYYAR, J.

- (3) Ss. 36, 38 and 40—Sale of immovable property—Application by purchaser for delivery of possession—Limitation—Limitation Act, Arts. 178 and 179.

Where immovable property has been sold under S. 36 of the Revenue Recovery Act, and an application is made by a purchaser for delivery of possession under S. 40 of the Act, the period of limitation for making the application is governed by Art. 178 and not by Art. 179.

S. 40 of the Revenue Recovery Act places the purchaser in the position of decree-holder for the purpose of putting the machinery of the Court in motion, in order that the certificate of sale granted by the Revenue authority may be given effect to. It does not, by implication, make the law of limitation, with reference to the execution of decrees or orders of Civil Courts, applicable to processes under S. 40 of the Act. **Sambasiva Mudaliar v. Panchanada Pillai**, 17 M.L.J. 441=3 M.L.T. 19.

References :—14 M.L.J. 433, 17 C. 491, 24 C. 473, *Expt.*; 8 M. 207, 17 M. 379 and 29 M. 529, R.

- (4) S. 38—See No. 3, *supra*.

- (5) S. 40—See No. 3, *supra*.

6.—Madras Acts.—(Continued).

Act VII of 1865 (Irrigation Cess).

- (1) See CONTRACT ACT, No. 34, 17 M.L.J. 145.

Act VIII of 1865 (Rent Recovery).

- (1) Judgment in Civil suit—Distraint for rent, validity of—Merger of cause of action.

The judgment in a Civil suit for rent merges the cause of action for rent, and such rent can no longer be distrained for, under the provisions of the Rent Recovery Act, if the judgment is executable and stands unreversed at that time, although, subsequently, the judgment may be reversed on appeal.

The doctrine of merger under this circumstance is an application of the maxim *nemo debet bis vexari pro una et eadem causa*, which is applicable to the circumstances of this country. **Chinnappa Rowther v. Robert Fischer**, 17 M.L.J. 411=30 M. 495=3 M.L.T. 22.

BENSON and WALLIS, JJ.

References :—17 M.L.J. 295, 9 T.L.R. 568, (1844) 13 M. and W. 494=67 R.R. 694 (1895), L.R. 1 Q. B. 108 and (1903) 3 East 251=7 R. R. 449, R.

- (2) Zemindar and Inamdar—Exchange of Putta and Muchilika, necessity for—Applicability of summary provisions.

Inamdars are not bound to exchange puttas and muchilikas with the zemindar but can be proceeded against as tenants, under the summary provisions of the Act (a), even though the Inamdars happen to possess the kudivaram right in the property (b). **Prasad Naidu v. Jaggayya**, 17 M.L.J. 473=30 M. 493=2 M.L.T. 469.

BENSON and BONDAM, JJ.

References :—(a) 21 M. 116, F. (b) 16 M.L.J. 489, F.

- (3) Voluntary fees—Validity of their inclusion in pattah—Prior suit against tenant—Failure to object to include voluntary fees—*Res judicata*.

Fees paid by tenants for temple, which are *prima facie* of a voluntary character, cannot be included in the pattah, unless they are shown to be a charge on the land or to be payable with the rent, according to established law and usage (a).

Where, in a former suit against the tenants, they did not object to the inclusion of those voluntary fees in the pattah as a defence in the suit, held, that the decision in the prior

6.—Madras Acts.—(Continued).

Act VIII of 1865 (Rent Recovery).—(Contd.).

suit rendered such a defence in a subsequent suit *res judicata* (b). **Sellappa Chetty, v. Yelayutha Tevan**, 17 M.L.J. 493=30 M. 498=8 M.L.T. 17.

BENSON and WALLIS, JJ.

References:—(a) 17 M. 43, R.; (b) 13 M. 287, R.

(4) *Tender of pattah to manager of joint Hindu family.*

The tender of pattah to the manager of the family to which the land belonged is a sufficient tender to him and the other members of the undivided family named in the pattah, as it would be within the scope of his authority as managing member to accept or reject the pattah tendered on behalf of the family. **Driver v. Muthia**, 17 M.L.J. 251.

BENSON and WALLIS, JJ.

References:—28 M. 393, R.

(5) *Landlord distraining for rent—Right to sue for rent pending distress—Sale after judgment in suit—Sale for non-compliance with excessive demand—Legality.*

When a landlord distrains for rent and does not sell the goods, he cannot bring an action for the rent, so long as he holds that distress, though it be sufficient to satisfy the rent. There is, however, no authority for the proposition that the mere institution of the Civil suit makes it illegal to proceed further with the summary proceedings then pending, although it may be that, if the defendant does not plead the summary proceedings in answer to the Civil suit, but allows it to proceed to judgment, the debt will merge in the decree, and further summary proceedings become illegal (a).

A sale made in consequence of non-compliance with an excessive demand is illegal (b). It is immaterial that, at the time of sale, credit was given for the payment by the tenant, and that the sale was held for the amount actually due. It is the demand of the tenant which must be looked to.

A person, who is barred by Art. 12, Limitation Act, from suing to set aside the summary sale, may, in a suit for possession by the purchaser of the holding, nevertheless, plead in defence the invalidity of the sale (c). **Singu Venkatachalapati Aiyar v. R. Fisher**, 17 M. L.J. 294 = 30 M. 444.

BENSON and WALLIS, JJ.

6.—Madras Acts.—(Continued).

Act VIII of 1865 (Rent Recovery).—(Contd.).

References:—(a) L. R. 10 Ex. 242, 5 C. 8, 12; (b) 26 M. 261, F; (c) 17 M.L.J. 19, R.

(6) *Ss. 3, 8, 9 and 72—Tender of patta and execution of muchilika—Effect of—Second tender of patta, whether valid.*

The tender of a patta is only the offer to perform an obligation already attaching to a landholder, but when the patta has been tendered and accepted and a muchilika executed, the result is an agreement binding upon the parties for the period to which the instruments relate, so long as they are in force. During such period, the landlord is not entitled to deliver a second patta and proceed for the rent due under the second patta. **Lakshminarayana Reddy v. Gurusawmi Udayan**, 30 M. 253=2 M.L.T. 325.

SUBRAHMANIA Aiyar and MILLER, JJ.

References:—9 M.L.J. 183 and 28 M. 379, D.

(6-a) S. 8—See No. 6, *supra*.

(6-b) S. 9—See No. 6, *supra*.

(7) *S. 11—Zamindari lands—Raising of second crop by tenants on punjai (dry) land—Custom—Onus of proof—Enhancement of rent on account of tenant's improvements.*

The burden of proving that punjai or dry land is liable to a charge for second crop, when irrigation is carried on with the aid of the tenant's well lies on the Zamindar. In the absence of proof of such custom, such charge is an enhancement of rent on account of the tenant's improvements within the meaning of S. 11 of the Act. **Kumara Reddi v. Thumbichi Naicker**, 17 M.L.J. 513.

WALLIS and MILLER, JJ.

Reference:—21 M. 136, F.

(8) *S. 11—Method of fixing rent—Contract for share in the benefit of tenants' improvements—Decision of Revenue Court, when res judicata—Ownership of poramboke land—Admissibility of judgment in previous suit—Effect of preferring appeal.*

S. 11 of the Rent Recovery Act contemplates rents being fixed by contract, and it is only, in the absence of contract, express or implied, that resort is to be had to the methods of fixing rent specified in Cls. 2 and 3. Cl. 4 which also deals with waste unoccupied lands reserves the landlord's right to coteract, on any term he

6.—Madras Acts.—(Continued).

Act VIII of 1885 (Rent Recovery).—(Contd.).

likes, in the absence of any special right held by any class such as Mirasdars. There is nothing in proviso to Cl. 4 to make a contract illegal, which would have the effect of giving the landlord a share in the benefit of the tenants' improvements.

There is no express prohibition of contracts of this kind, which merely perpetuate, to a greater or less extent, a feature of the old waram system (a).

Payment of a certain rate over a long series of years would *prima facie* be prescriptive evidence of a contract (b).

The decision of a Court of Revenue, as to the propriety of a particular condition in a patta, when such decision does not proceed on any consideration peculiar to the particular *fash*, is *res judicata*, between the parties in subsequent suits in the same Courts, just as much as the question whether the relation of landlord and tenant exists between the parties (c).

In a suit between Zemindars and Mirasdars as to the ownership of poramboke lands, a judgment in a previous suit between the Zemindar and certain other Mirasdars, wherein it was held that the waste lands were the property of the Mirasdars, is admissible as evidence under S. 13 of the Evidence Act (d).

The effect of a Zemindar's appeal from the decree of the Head Assistant Collector settling the terms of the pattas was to re-open the decree, and it is competent to the parties to agree that the case should be remanded for the trial of fresh issues, even on points which were not raised in the Zemindar's grounds of appeal. *Natesa Gramani v. Yenkatarama Reddi*, 17 M.L.J. 518 = 2 M.L.T. 455.

BENSON and WALLIS, JJ.

References :—(a) 21 M. 136, D; 28 M. 328, 28 M. 444, R; (b) 4 M. H. C. R. 398, R; (c) 13 M. 287, F; (d) 26 M. 371, D.

(9) S. 11, Cl. (4), proviso 2—*Enhancement of rent.*

Proviso 2 is not limited to cases in which the previous landlord has let out lands at a reduced rental, in such a way that his conduct amounts to a fraud on his successor. The proviso says nothing about fraud and the Court cannot refuse to apply the plain provisions of the Act unless fraud is proved. Therefore, the successor is not bound by the reduced rates in the absence of anything to show that they were

6.—Madras Acts.—(Continued).

Act VIII of 1885 (Rent Recovery).—(Contd.).

granted on any of the grounds specified in the proviso. *Samarapuri Mudallar v. Nagappa Mudallar*, 17 M.L.J. 86.

MILLER and WALLIS, JJ.

Reference :—2 M. 80, D.

(10) S. 11, Prov. I—*Improvements by tenants—Claim to increased rent—Varying rates under old waram system according to nature of crop—Public policy.*

The proviso to S. 11 of the Act reserves the right of the land-holder, with the Collector's consent, to raise the rent in consequence of additional value imparted to the land by means of improvements effected at his own expense, or by Government, where Government has required him to make an additional payment in consequence of such improvements; and, by implication, the proviso negatives any right on the part of the land-holder to claim increased rent in consequence of improvements effected by the tenant (a).

It is not opposed to public policy or to the provision of the first proviso that, where money assessments were substituted for waram, the incidents of the old waram system should be perpetuated by charging varying rates according to the nature of the crop, without regard to the question whether the crops are raised by the aid of tenant's improvements or otherwise. *Suppa Pillai v. Thumbichi Naicker*, 17 M.L.J. 511.

WALLIS and MILLER, JJ.

References :—21 M. 136 and 28 M. 328, *Expl.*

(10-a) S. 14—See No. 12, *infra*.

(10-b) S. 16—See No. 12, *infra*.

(11) S. 18—*Sale under the Act—Seven days' interval required between notice and sale—Defendant in possession—Plea of invalidity of sale—Limitation.*

A defendant in possession, who had not applied to have a sale for arrears of rent set aside, is not precluded from setting up the invalidity of the sale, merely because an application to set aside the sale would have been, at the date of suit, barred by limitation.

In fixing the day of sale, under S. 18 of the Rent Recovery Act, seven whole days must elapse between the day of notice and the day fixed for sale, but not seven periods of 24 hours computed from the hour of the day on

6.—Madras Acts.—(Continued).**Act VIII of 1885 (Rent Recovery).—(Contd.).**

which the notice was published (a). **Ramasari v. Nuthusawmi Nalk**, 30 M. 248.

WHITE, C.J., and MILLER, J.

Reference:—(a) (1903) 2 K.B. 163, R.

(12) *Ss. 39, 16 and 14—Attachment for larger amount than that due as rent—Validity.*

An attachment for a larger sum than that actually due as rent is not invalid, but is good to the extent of the rent found to be due on correct calculation, in case the patta is correct and has not been altered by the Court. It may be otherwise when a sale takes place under such circumstances. **Periakaruppa Pillai v. Miller**, 17 M.L.J. 479 = 3 M.L.T. 29.

BENSON and MILLER, JJ.

References:—26 M. 260, 29 M. 75, D; 10 M. 229, F. 25 M. 618, 27 M. 465, R.

(18) *Ss. 39 and 78—Sale under the Act set aside by a Civil Court—purchaser's right to recover purchase money—Limitation—Art. 97, Limitation Act—Rent paid when in possession, right to recover.*

Where a sale by a District Board as landlord on account of arrears of rent due from the tenant, under S. 39 of the Act, is set aside in a subsequent suit brought by the tenant, the purchaser has a right to sue for the refund of the purchase money, inasmuch as it was money paid for existing consideration that has subsequently failed. But the purchaser cannot recover the rent paid to the landlord during the period he was in possession.

The article of the Limitation Act applicable to the suit is Art. 97, and the suit should be brought within three years from failure of consideration. S. 78 of the Rent Recovery Act, which prescribes the six months' period of limitation, does not govern the present case, as the liability sought to be enforced is not one in respect of money paid under the authority of the Rent Act, or for damages in respect of anything professedly done under its authority. **Appayoo Odayan v. The District Board of Tanjore**, 17 M.L.J. 298.

SUBRAHMANIA AYYAR, J.

(14) *Ss. 41, 43 and 69—Collector's order setting aside his previous order for issue of warrant for ejecting tenant—Whether appeal*

6.—Madras Acts.—(Continued).**Act VIII of 1885 (Rent Recovery).—(Concl.).**

lies to District Court against the order—Meaning of "judgment".

The term "judgment" is not defined in the Act, and must, therefore, be understood as including all decisions by the Collector, which determine the rights of parties. When an appeal is preferred by a tenant under S. 43, the matter of the application of the landholder, on which the warrant is issued *ex parte*, becomes litigious and has to be decided upon evidence as any other contested matter of right, and the Collector must act judicially in dealing with the evidence. To hold that no appeal lies against the decision would be to place the landholder at a disadvantage, and compel him to resort to the comparatively dilatory and expensive remedy of a suit in the Civil Courts. In this view, it must be conceded that the right of appeal exists in favour not only of the landholder, but also of the tenant. **Dontarauj Subbarayadu v. Nekkalapudi Lingayya**, 2 M.L.T. 106 (F.B.) = 17 M.L.J. 129 = 30 M. 473.

SUBRAHMANIA AYYAR, BENSON and MILLER, JJ.

References:—5 M.H.O.R. 289, *Considered*; 22 M. 296 and 25 M. 458, R.

(14-a) S. 43—See No. 14, *supra*.

(14-b) S. 69—See No. 14, *supra*.

(14-c) S. 72—See No. 6, *supra*.

(14-d) S. 78—See No. 18, *supra*.

(15) *S. 85—Receiver appointed by Court—Necessity for leave to sue him—Effect of section.*

A receiver appointed by Court is a public officer holding lands in attachment under the order of a Civil Court, within the meaning of S. 85 of the Act. He is, by virtue of the section, to have all the powers of a landholder and be subject to the same restrictions. The effect of the section is to give a statutory right of suit against him, and leave of the Court is not necessary. **Kuppusawmy Iyer v. Suppan Chetty**, 17 M.L.J. 489 = 30 M. 505 = 3 M.L.T. 7.

BENSON and WALLIS, JJ.

Act IV of 1886 (Infrafranchised Inam).

(1) *Infrafranchisement of hereditary inam in favour of Hindu widow—Widow's powers of alienation—Effect of enfranchisement.*

6.—*Madras Acts.*—(Continued).**Act IV of 1866 (Enfranchised Inam).—(Concl'd.)**

In cases of enfranchisement of service inams, the enfranchisement disannexes the inam from the office, converts it into ordinary property, and releases the reversionary rights of the Crown in the inam, but it does not confer on the persons named in the title-deed any right in derogation of those possessed by other persons in the inam at the time of the enfranchisement

(a). A Hindu widow, therefore, cannot alienate, beyond her own life-time, a service inam enfranchised in her name under Act IV of 1866, except in cases of necessity authorised by the Hindu Law applicable to ordinary property held by her as a widow.

The principle to be applied to the construction of title-deeds issued subsequent to the Act is that expressly laid down by the Act as applicable to title-deeds issued prior to the Act. *Pingala Lakshmiipathi v. Chalamayya*, 17 M.L.J. 101 (F.B.)=2 M.L.T. 101=80 M. 484.

SUBRAHMANIA AIYAR, BENSON and WALLIS,
JJs.

References:—(a) 10 M. 1, 26 M. 339, *Appr.* 7 M. 286, 8 M. 249, 15 M. 284, 21 M. 7, 28 M. 47, R.

Act I of 1876 (Land Revenue Assessment).

- (1) *Separate registration and sub-division of portion of permanently-settled 'estate'—'Alienation', 'alienor', 'alienee', meaning of—Jurisdiction of Collector—Private agreement apportioning peishcush not binding on Government.*

Where plaintiff, an alienee of a portion of a permanently settled estate, applied to the Collector for its separate registration and sub-division, and the third defendant, who held a share in the *Mitta*, in which plaintiff was a shareholder under his alienation, raised an objection to such separate registration, on the ground that the parties had agreed, under a private partition between the alienor and the other co-sharers to apportion the *peishcush*, payable by each shareholder, and that the amount of *peishcush* to be fixed by the Collector, as payable by the plaintiff, ought not to differ from the amount fixed by the agreement, *held*, that it was the duty of the Collector to enquire into the objection raised by that defendant and, if he disallowed it, to grant the plaintiff's application.

The agreement to apportion the *peishcush* made between themselves by the parties is not binding on the Government.

6.—*Madras Acts.*—(Continued).**Act I of 1876 (Land Revenue Assessment).—(Concluded).**

The terms 'alienor' and 'alienee' in the Act are reciprocal, and necessarily imply only those parties between whom the reciprocal relation exists; in this view, the third defendant is not a party to the particular alienation, in respect of which the application was made to the Collector.

There is no foundation for the view that 'alienation' refers only to an alienation by a person, whose name is entered in the Collector's register; S. 8 of Madras Regulation XXV of 1802 plainly implies the contrary. *Collector of Salem v. Peer Batcha Sahib*, 16 M.L.J. 468=1 M.L.T. 421=80 M. 106.

SUBRAHMANIA AIYAR and MILLER, JJs.

Act V of 1882 (Forests).

- (1) Ss. 3 and 5—Inclusion of land within reserve forest—Claim by owner dismissed for default by Forest Settlement Officer—Subsequent civil suit barred—See Act I of 1894 (LAND ACQUISITION), No. 9 (f), 17 M.L.J. 557.

Act IV of 1884 (Dt. Municipalities.)

- (1) Ss. 10, 10 A, 19, 34, 35 36—*Election of Municipal Councillor—Right of Government to set aside the election on account of disqualification of the candidate.*

S. 10 A expressly declares that persons, convicted of offences implying a defect of character, are not qualified to be appointed by election or otherwise, and the Government has power to make rules as to how such disqualification should be ascertained and enforced, and to make the validity of an election dependent on the absence of such disqualification. Rules 34, 35 and 36 were therefore duly made, and not *ultra vires*. The general scope of these rules is to provide for questioning the validity of elections, by petitions put in within 15 days of the date of election, and it is only orders by the Collector on such petitions that are made final by rule 36. Rule 34, however, besides providing for election petitions, reserves the right of the Government or the Collector himself to take action on any facts, affecting the validity of an election, which may come to their notice. When the fact of a conviction comes to the notice of the Governor-in-Council, these words authorise him to take action by stating that, in his opinion, the conviction implies a disqualifying defect of character, and ordering a new

6.—*Madras Acts.*—(Continued).

Act IV of 1884 (Dt. Municipalities).—(Contd.)

election accordingly; and he is not restricted to proceeding by enquiry under rule 35.

It may be that the Governor-in-Council might have, by notification, "removed" the nominee, on the ground that he was not qualified for election, but it would not follow from that that he is unable to take power by rule to invalidate the nominee's election on the same ground, without a notification.

But rules 35 and 36 do not warrant the validity of an election being questioned on the ground that the nominee was likely to bring the municipal administration into contempt, without such inquiry as is there provided for, and a disqualification pronounced without such inquiry cannot be supported. **The Secretary of State for India in Council v. P. R. Venkatesalu Naidu**, 1 M.L.T. 435=30 M. 113.

MILLER and WALLIS, JJ.

(1-a) S. 10-A.—See No. 1, *supra*.

(1-b) S. 19.—See No. 1, *supra*.

(1-c) S. 34.—See No. 1, *supra*.

(1-d) S. 35.—See No. 1, *supra*.

(1-e) S. 36.—See No. 1, *supra*.

(2) S. 45.—Agreement not in conformity with—Invalidity.

An agreement entered into by a Municipal Council with a person, which should have been effected in the manner prescribed in S. 45 of the Act, is not valid, if its provisions are not complied with. Such an agreement binds no party (a); and the fact that the agreement was partially acted upon cannot be held to render it an operative contract, in spite of the provisions of the statute which have been violated. **Raman Chetti v. The Municipal Council of Kumbakonam**, 2 M.L.T. 294=30 M. 290.

SUBRAHMANYA IYER and MILLER, JJ.

Reference:—(a) 27 B. 618, R.

(3) S. 66—House-tax—Yearly and not half-yearly tax—Apportionment of tax between different owners.

The house-tax leviable under the Act is yearly and not half-yearly tax, and this fact is made clear by the provisions of S. 66 (1).

The circumstances that this tax is made payable in two equal half-yearly instalments does not make the amount two distinct taxes or assessments absolutely independent of each other.

6.—*Madras Acts.*—(Continued).

Act IV of 1884 (Dt. Municipalities). (Concl'd.)

There is nothing in the provisions of the Act that makes it compulsory on the part of the Municipality to apportion the tax for any particular year among persons, in whom the ownership of the house may have resided during the period.

The Municipality has the right to proceed for the year's tax on all or some of the owners, whether they are common owners occupying simultaneously or successive owners, leaving them to adjust their liabilities *inter se* by appropriate proceedings, in case dispute arises between them in the matter. **Nellore Municipality v. Kotamma**, 17 M.L.J. 306=30 M. 423.

SUBRAHMANYA AIYAR, J.

Act V of 1884 (Local Boards).

(0) S. 150—Contract for tolls entered into with Local Fund Board—Implied breach of contract to keep road fit for traffic—Damages—Limitation—See CONTRACT ACT, No. 35, 2 M.L.T. 194=17 M.L.J. 390.

(1) Ss. 162 and 165—Agreement for collection of fees in a market—Construction—Penalty—S. 74 of the Contract Act—Limitation Act, Arts. 68, and 115—Felonious Act—Civil suit without criminal prosecution.

Even if it be an established principle of the law of England, that the policy of the law will not allow a person injured by a felonious act to seek civil redress, if he has failed in his duty of bringing or endeavouring to bring the felon to justice, as to which there seems to be some doubt, the principle does not apply to a case, where the defendant is not criminally liable for the offences committed by his agent, and the suit is not brought against the party, who is alleged to have been guilty of an offence under S. 165 of the Local Boards Act (V of 1884) (a).

An agreement by the defendant with the President of the Taluq Board, in respect of the collection of fees in a market, provided, among others, "If I, my agent, or servant, were to act contrary to the above regulations, I shall be liable to pay a fine not exceeding Rs. 50 imposed by the President of Taluq Board, or I am not entitled to object, if my *gutta* is put up for auction again (myself being ?),* subject to the loss that may be sustained by the Taluq Board."

6.—Madras Acts.—(Continued).**Act V of 1894 (Local Boards).—(Concl'd.)**

Held (1) that the agreement in question is not an instrument of the same nature as a bail bond or recognizance, within the meaning of the exception to S. 74 of the Contract Act. It is a bond given for the performance of a public duty or act in which the public are interested (b). But there is no section in the Local Boards Act, which authorizes or requires the giving of such bond. (2) Under S. 74 of the Contract Act, it is open to the Court to award the party complaining of the breach reasonable compensation not exceeding the amount named in the bond, without reference to any actual loss sustained by the Board. (3) The extortion of unauthorised tolls, from the class of persons, who make use of the market is a serious offence, and the amount of penalty specified in the bond is recoverable as compensation. (4) A suit for the recovery of the penalty is governed by Art. 68 or Art. 115 of the Limitation Act and not by Art. 6 of the Act. (5) The provision authorizing the plaintiff to put the defendant's *gutta* up to auction does not preclude the plaintiff from recovering upon his contract. (6) The penal clauses of the Local Boards Act, S. 162 (c) and (d) do not preclude the plaintiff from recovering under his contract with the defendant. **Taluq Board, Kundapur v. Lakshmi Narayana Kamphthi**, 17 M.L.J. 537 = 2 M.L.T. 461.

WHITE, C.J.

References:—(a) 10 Ch. D. 667, 9 M. 463, *R*;
(b) 16 M. 175, *R*.

(2) S. 165—See No. 1, *supra*.

Act III of 1895 (Hereditary Village Offices).

(1) *Emoluments of office—Collector's jurisdiction—Suit in a Civil Court—Ss. 13 and 21 of Civil Procedure Code—Res judicata.*

The Collector is competent, under S. 13 of Act III of 1895, to try whether certain lands are emoluments of office or not. The parties are debarred, by the express provisions of S. 13 of the Code of Civil Procedure and the general principles of *res judicata*, from re-agitating the same question in a suit before a Civil Court. In such a case, it is not necessary to have recourse to the provisions of S. 21 of the Code, which it would only be necessary to look to, if the question had not already been decided in a suit under S. 13 of the Act III of 1895.

6.—Madras Acts.—(Continued).**Act III of 1895 (Hereditary Village Offices).—(Continued).**

Baliyepalli Seshayya v. Baliyepalli Subbayya, 30 M. 320.

BENSON and WALLIS, JJ.

References:—30 M. 126, 13 M. 41, and 17 M. 302, *R*.

(2) *Ss. 4, 13, and 21—Suit to recover land alleged to be the emolument of plaintiff's office of karnam—Defendant's denial of plaintiff's claim—Jurisdiction of Civil and Revenue Courts.*

A suit, in which the plaintiff claims to recover possession of land, which he alleges is the emolument of his office of *karnam*, and the defendant resists the plaintiff's claim on the ground that the land is not the emolument of the office, but is the private property of the plaintiff, is a suit for emoluments and the Civil Courts have no jurisdiction to entertain the suit.

S. 21 takes away the jurisdiction of the Civil Courts in suits for emoluments and, under section 4, emoluments may be lands. Therefore, the words "emoluments of any such office" occurring in Ss. 13 and 21, must be construed as including a claim for lands, which are alleged to constitute the emoluments of the office.

The word "emoluments" in S. 21 is not limited to emoluments, when there is no dispute as to what constitutes the emoluments.

In the absence of express declaration by the Legislature, the jurisdiction of the Civil Courts must be limited to the two cases mentioned in S. 13 (1), para. (ii), and in the proviso to S. 21.

Per MILLER, J.—Where the emoluments are secured to the plaintiff, it may be unnecessary to take away, from the Civil Court, the duty of determining their precise nature; but if the emolument itself is in jeopardy, the decision must be placed in the hands of the Revenue Court, which is specially appointed for the protection of service inams; and the object of the Legislature might, in some cases, be defeated, if the adjudication be not confined to the Revenue Courts, in cases in which the inam is undoubtedly land.

Suits not within the terms of S. 13 (1) may be cognizable by the Civil Courts, for, though S. 21 is wide enough to embrace all claims for emoluments, however granted, that section

6.—*Madras Acts.*—(Concluded).

Act III of 1895 (Hedretary Village Officers).—(Concluded).

must be read with S. 18, so as not to deprive a suitor of all remedy in cases not within the latter section. *Kesiram Narasimhulu v. Yuddanda Row Narasimhulu Patnaidu*, 1 M.L.T. 381 (F.B.) = 16 M.L.J. 514 = 30 M. 126.

WHITE, C.J., BENSON and MILLER, JJ.

References:—4 M.H.C.R. 70, R; 18 M.41, D.

(3) S. 18—See No. 2, *supra*.

(4) S. 21—See No. 2, *supra*.

7.—*N.W.P. Acts.*

Act XIX of 1873 (N.W.P. Land Revenue).

(1) S. 66—*Cess—House-tax.*

Held that a payment described in the village *wajib-ul-arz* as made to the zamindars under the name of "gharghanna," being a kind of house-tax, was a cess within the meaning of Act No. XIX of 1873, and not recoverable, unless recorded by the Settlement Officer and sanctioned by the Local Government. *Muhammad Abdul Hai v. Nathu* (I.L.R. 27 All., 188), referred to. *Shankar v. Balwant Singh*, A.W.N. (1907), 247.

GRIFFIN, J.

Reference.—27 A. 183, R.

(2) Ss. 154 and 190—*Mahal taken under direct management—Rent of sir land fixed by Collector—Sale of mahal before release from direct management.*

A mahal was taken by the Collector under direct management, and the late proprietor was recorded as ex-proprietary tenant of the sir land, and his rent was fixed by the Collector under the provisions of S. 190 of Act No. XIX of 1873. While still under direct management, the mahal was sold. The purchaser paid up the arrears of land revenue due thereon and possession was given to him. *Held*, that the purchaser was entitled to claim from the ex-proprietary tenant the rent fixed by the Collector: it was not incumbent upon him to get the rent fixed again. *Hasan Ali Khan v. Masbarat-Hasan*, A.W.N. (1907), 61 = 4 A.L.J. 240 = 29 A. 318.

STANLEY, C.J., and BURKITT, J.

(3-a) S. 190—See No. 2, *supra*.

(3) Ss. 194 (g), and 203—*Powers of Court of Wards—See COURT OF WARDS, No. 1, 4 A.L.J. 495.*

7.—*N.W.P. Acts.*—(Continued).

Act XIX of 1873 (N.W.P. Land Revenue).—(Concluded).

(4) S. 203—See No. 3, *supra*.

Act XVI of 1882 (Jhansi Encumbered Estates).

(1) S. 8, cl. c (1)—*Mortgage by a disqualified proprietor—Suit after the cessation of disqualification—Not maintainable—Consideration—Void—Contract Act (IX of 1872)—Limitation Act (XV of 1877), Sch. II, Art. 75—Money decree.*

A disqualified proprietor, under the Jhansi Encumbered Estates Act, mortgaged his property during the time when his disqualification had not ceased. After the disqualification had ceased the mortgagee brought a suit for foreclosure. *Held*, such a mortgage being forbidden, by the provisions of the law, the consideration was also forbidden and it was void under S. 23 of the Indian Contract Act, and the provisions of S. 43 cannot be applied to such a case.

The claim having been brought more than six years after the whole money became due, a decree for money could not be given as it was barred by Art. 75, Sch. II, Limitation Act. *Radha Bai v. Kamod Singh*, 4 A.L.J. 696 = A.W.N. (1907) 276.

BANERJI and AIKMAN, JJ.

Act III of 1899 (Court of Wards).

(1) Ss. 9, 35 and 47—*Court of Wards, powers—See COURT OF WARDS, No. 1, 4 A.L.J. 495.*

(2) S. 35—See No. 1, *supra*.

(3) S. 47—See No. 1, *supra*.

Act I of 1900 (Agra and Oudh Municipalities).

(1) S. 47—*Contract endorsed on back by Vice Chairman and Secretary—Bust for damages—Maintainable.*

The defendant entered into a contract with the plaintiff, a Municipal Board, for storing and consolidating *kankar*. The defendant failing to perform his part of the contract, the plaintiff sued him for damages. The agreement was signed by the defendant, and on the back were endorsed the signatures of both the Secretary and the Vice-Chairman, and this endorsement referred to the contents of the contract and its confirmation. *Held*, that this was a sufficient compliance with the requirements of the Act. *Municipal Board of Najibabad v. Shree Narain*, 4 A.L.J. 216 = A.W.N. (1907), 88 = 25 A. 345.

KNOX and RICHARDS, JJ.

7.—*N.W.P. Acts.*—(Continued).

Act I of 1900 (Agra and Oudh Municipalities).
(Concluded).

- (2) *Ss. 88, 148*—Notice issued by Municipal Board—Civil Court, jurisdiction of.

Where the constructions which a Municipal Board seeks to have demolished, do not overhang, project into, or encroach on, any street, a notice for their demolition issued by the Board is not justified by the provisions of S. 88 of the Act.

A suit will consequently lie in the Civil Court, at the instance of the person served with the notice, for a declaration that the Municipality has no right to have the constructions in question removed. *Alopi Din v. The Municipal Board of Allahabad*, 4 A.L.J. 8=A.W.N. (1907), 2.

STANLEY, C.J. and BURKITT, J.

- (3) S. 148—See No. 2, *supra*.

Act II of 1901 (N.W.P. Tenancy).

(1) Application of S. 45, Civ. Pro. Code, to—See CIV. PRO. CODE, No. 52, 3 A.L.J. 610=A.W.N. (1906), 253=29 A. 18.

- (2) *Ss. 20, 21 and 31*—Occupancy holding—usufructuary mortgage—Act No. IX of 1872 (Indian Contract Act), S. 23.

An occupancy tenant executed a usufructuary mortgage of his occupancy holding, and then executed a kabuliati undertaking to pay rent for the mortgaged land. *Held*, on suit by the mortgagee for rent, under the terms of the kabuliati, that the agreement between the parties was of a nature which, if permitted, would defeat the provisions of the Tenancy Act, 1901; that it was unlawful within the meaning of S. 23 of the Contract Act, and void. *Ram Sarup v. Kishan Lal*, A.W.N. (1907), 76=4 A.L.J. 306.=29 A. 327.

BANERJI and AIKMAN, JJ.

References.—A.W.N. (1906), 302, 300, 28 A. 696, F.

- (2-a) S. 21—See No. 2, *supra*.

(3) S. 23—Widow acquiring right in occupancy holding before the Act—Effect of re-marriage—Contract Act (IX of 1872), S. 21—Mistake of Law.

A widow, who succeeded to the rights of her husband in any occupancy holding, before the new Tenancy Act came into force, could not lose it, after the passing of the new Act, on account of her re-marriage.

7.—*N.W.P. Acts.*—(Continued).

Act II of 1901 (N.W.P. Tenancy).—(Concluded).

Where the parties honestly believed that the plaintiff had lost her right to the occupancy rights of her husband, by reason of her second marriage, and there was no fraud or misrepresentation by the defendant zemindar, and the plaintiff agreed to take the land on an increased rate of rent under a lease, *held* that the lease could not be set aside, as it was a contract entered into between the parties by reason of an innocent mistake on a point of law shared by all the parties (a). *Sahiban Bibi v. Madho Lal*, 4 A.L.J. 475=A.W.N. (1907) 197.

KNOX, A.C.J., and RICHARDS, J.

Reference :—(a) 17 C. 291, *Distd.*

(3-a) S. 31.—See No. 2, *supra*.

- (4) S. 32—Agreement dividing holdings—Suit for possession of a moiety barred.

A suit for possession of a moiety of cultivatory holdings is a suit for division of those holdings, inasmuch as the Court is asked to declare that the plaintiff is entitled to an undivided share of the holdings and to put him in possession of that share.

If the owners of an occupancy holding enter into an agreement and divide the holding, the division would not be binding on the landlord.

A suit for possession of a share in such holding under the agreement is barred by the provisions of S. 32 of the Act. *Achhey Lal v. Janki Prasad*, 3 A.L.J. 735=A.W.N. (1906), 274=29 A. 66.

STANLEY, C. J., and KNOX, J.

(4-a) S. 32. Division of tenancy—Abatement—Death of pro form defendant.

Plaintiffs claimed a half share in an occupancy holding and prayed for possession of that share or such other relief as the Court might think fit to grant. The Court below passed a decree for possession of the share claimed.

Held that this was substantially a decree for division of the holding and was opposed to S. 32 of the Tenancy Act. The plaintiffs were, however, entitled to a declaration of right to one-half of the holding.

The death of a pro forma defendant, who had appealed along with the other defendants who could have maintained their appeal independent

7.—N.W.P. Acts.—(Continued).

Act II of 1901 (N. W. P. Tenancy).—(Contd).

ently of the said *pro forma* defendant, does not serve to abate the appeal of other defendants. **Ashiq Husain v. Aghhari Begam**, 4 A.L.J. 809.

BANERJI and AIKMAN, JJ.

(5) S. 32—Suit for exclusive possession of an occupancy holding—U. P. Land Revenue Act (III of 1901, Local), S. 44—Revenue Court refusing to correct an entry—Jurisdiction of Civil Court.

Where a suit is brought by the plaintiff for exclusive possession of an occupancy holding on the ground that the defendant is a trespasser, it cannot be regarded as a suit for division of an agricultural holding, and S. 32 of the Agra Tenancy Act does not bar it (a).

The decision of the Revenue Court refusing to correct an entry in the revenue register as to the name of a tenant cannot preclude the plaintiff from maintaining a suit in the Civil Court. S. 44 of the Agra and Oudh Land Revenue Act refers to registers A—D and not to register E. **Ajodhya Singh v. Ram Dyal, Upadhyia**, 4 A. L. J. 769.

BANERJI, J.

Reference:—26 A. W. N. 274, D.

(6) Ss. 105 and 106—Jurisdiction to appoint an Amin—Powers of Amin—Not entitled to determine rent.

When there is no dispute about the division of the crop or its quantity or value, a Court has no jurisdiction to appoint the Amin to make an award. Where an Amin has been appointed under S. 105, his duty is only to estimate or appraise, and not to decide the proportion the lambardar was to receive from the tenant. Sub-section 6 of S. 106 only entitles the Amin to determine the rent, as the result of what he finds to be the quantity and value of the crop, and his award is not final within the meaning of sub-section. **Rahim Bakhsh v. Ahmad Ali Khan**, 4 A.L.J. 489=A.W.N. (1907) 189.

RICHARDS, J.

(6-a) S. 136—See No. 6, *supra*.

(7) S. 158—Act (Local) No. III of 1901 (United Provinces Land Revenue Act), Ss. 103, 66 and 210—Suit asking for assessment of revenue on a certain area of land—Misdescription of suit—Appeal.

Where the plaintiff sued in a Court of Revenue, asking for revenue to be assessed on a

7.—N.W.P. Acts.—(Continued).

Act II of 1901 (N. W. P. Tenancy).—(Concld).

certain area of land, and describing his suit as one under S. 158 of the Agra Tenancy Act, 1901, where as he should have come to Court under S. 103 of the United Provinces Land Revenue Act, 1901, or possibly under S. 66 of the same Act, it was held that an appeal lay to the superior Revenue Court and not to the District Judge. **Narain Das v. Balgobind**, A.W.N. (1907). 225.

RICHARDS, J.

(8) S. 159—"Other dues" in the section includes *lambardari* dues—See ACT III OF 1901 (LAND REVENUE), No. 6, 4 A.L.J. 781.

(9) S. 164 (2)—Negligence of predecessor—Decree against defendant, not justified.

S. 164 (2) of the Tenancy Act does not justify a decree against a defendant lambardar, for a share in sums, which remained uncollected, on account of negligence or misconduct of the predecessor of the defendant. **Gulzari Lal v. Dan Dayal**, 4 A.L.J. 244=A.W.N. (1907), 107.

AIKMAN, J.

Reference:—3 A.L.J. 608, F.

(10) Ss. 164 (2) and 166—Successor of a lambardar, liability of, for profits not collected by his predecessor.

The successor in title of a deceased lambardar is not liable to account for profits, which his predecessor may have failed to collect, or which he permitted to remain uncollected owing to negligence or misconduct. **Dip Singh v. Ram Charan**, 3 A.L.J. 698=A.W.N. (1906), 252=29 A. 15.

STANLEY, C.J., and KNOX, J.

(10-a) S. 166—See No. 10, *supra*.

(11) Ss. 167 and 177 (e)—Ejectment—Defence that defendant is a proprietor—Question of proprietary title—Limitation Act S. 5—appeal presented to wrong Court.

In a suit for ejectment, the defendant pleaded that he cultivated the land as a co-sharer. Held that this defence raised a question of proprietary title and an appeal lay to the District Judge.

The appeal was, however, preferred to the Commissioner, who returned the memorandum of appeal to be presented to the District Judge. It was presented beyond time, but the Judge admitted it. Held that the Judge exercised aright discretion in admitting the appeal.

7.—N.W.P. Acts.—(Continued).

Act II of 1901 (N. W. P. Tenancy).—(Contd.).

When a co-sharer cultivates more land than his share, he is not liable to ejectment as a tenant, but the proper remedy against him is by a suit for settlement of accounts. **Indar Lal v. Deojit**, 4 A.L.J. 1 = A.W.N. (1907), 26.

AIKMAN, J.

Reference:—2 A.L.J. 176, R.

(11-a) S. 177 (e)—See No. 11, *supra*.

(12) Ss. 177 and 199—Question of proprietary title—Decision by Assistant Collector—Appeal—See JURISDICTION (CIVIL AND REVENUE COURTS), No. 1, 4 A.L.J. 686.

(13) S. 182—Second appeal to District Judge—Further appeal to High Court.

No appeal lies to the High Court from a decree of the District Judge deciding a rent appeal from an appellate decree of a Collector. **Latchmi Narain v. Narotam Das**, 3 A.L.J. 688 = A.W.N. (1906), 272 = 29 A. 69.

RICHARDS, J.

(14) S. 193 (g)—Set-off—Suit against tenant who happens to be a lambardar.

No set-off can be allowed in a suit for recovery of rent under the Agra Tenancy Act, except for a sum due to the defendant on an unsatisfied decree under that Act or any enactment. Where, the plaintiff, a co-sharer, sued the defendant, who happened to be also the lambardar, for recovery of rent in respect of certain plots of land which he was cultivating, the lambardar was not allowed to claim a set-off of a sum which he had paid as a lambardar for the Government revenue due on plaintiff's share, inasmuch as it was a set-off of an amount the right to which arose in respect of a matter wholly different from the subject matter of the suit. **Ram Chandar v. Mona**, 4 A.L.J. 681 = A.W.N. (1907), 269.

BANERJI, J.

(15) S. 199—Determination by Revenue Court of question of proprietary title—Res judicata.

In answer to a suit for ejectment under S. 58 of the Act, the defendants pleaded that they were not tenants, but had proprietary rights in the land. The Revenue Court under the provisions of S. 199 of the Act determined the issue thus raised itself and decided as to one of the defendants that he was a tenant of the plaintiffs, and this decision became final. *Held*,

7.—N.W.P. Acts.—(Continued).

Act II of 1901 (N. W. P. Tenancy).—(Contd.).

that the decision of the Revenue Court was a bar to the institution by this defendant of a suit in a Civil Court claiming to recover possession of the same land as proprietor. **Sailg Dube v. Deeki Dube**, A.W.N. (1907), 1.

KNOX and AIKMAN, JJ.

(16) S. 199—Suit filed beyond the period prescribed by, but within time under Limitation Act—whether time barred.

When an order under S. 199 of the Agra Tenancy Act is passed by a Revenue Court, directing the defendant to file a suit in Civil Court within the time limited by that section, the ordinary period of limitation is thereupon suspended and the special period provided by the Tenancy Act is substituted. Such suit instituted beyond the period prescribed by the Tenancy Act is barred by limitation irrespective of the period prescribed by Sch. II of the Limitation Act. **Banwari Lal v. Gopi**, 4 A.L.J. 713 = A.W.N. (1907), 282.

DILLON, J.

(17) S. 199—Ejectment suit in Revenue Court—Omission on defendant's part to plead title in himself—See RES JUDICATA, No. 21, A.W.N. (1907), 189.

(17-a) S. 199—See No. 12, *supra*.

(18) Ss. 199 and 200—action in ejectment—Defence that defendant a sub-proprietor—Question of title—Decision of a Revenue Court same as decision of Civil Court—Appeal to Civil Court—Suit for declaration does not lie.

When the defendant to an action for ejectment defends the suit on the ground that he is not a tenant but a subordinate proprietor, he raises a question of proprietary title. The Revenue Court can either try the question itself, or refer the parties to the Civil Court, under the provisions of S. 199 of the Act. When it follows the former course and decides against him and orders his ejectment, an appeal lies to the Civil Court, and it is not open to him to bring a suit in a Civil Court for declaration of his subordinate proprietary right (a). The legislature intended that the decision of a Revenue Court upon a question of title should have the same effect as the decision of a Civil Court. **Beni Pande v. Raja Kausal Kishore Prasad Mal Bahadur**, 4 A.L.J. 53 = A.W.N. (1907), 6 = 29 A. 160.

BANERJI and AIKMAN, JJ.

7.—N.W.P. Acts.—(Continued).

Act II of 1901 (N. W. P. Tenancy).—(Contd.).

Reference :—(a) 2 A.L.J. 834, F.

(18-a) S. 200—See No. 18, *supra*.

(19) S. 201—Presumption—Recorded co-sharer—Defendants to rebut.

Where the plaintiff in a suit for profits is a recorded co-sharer, the presumption referred to in S. 201 of the Act arises in his favour, and it is for the defendants to rebut that presumption. In such a case, it is not for the plaintiff to prove, by evidence of receipt of profits within twelve years, that the right subsisted. **Banwari Lal v. Niader**, 4 A.L.J. 27 = A.W.N. (1907), 5 = 29 A. 158.

BANERJI and AIKMAN, JJ.

References :—27 A. 436, R.

(20) S. 201—Act No. I of 1872 (*Indian Evidence Act*), S. 4—Evidence—Record of plaintiff's name as a co-sharer—Presumption.

The presumption rejoined by clause (3) of section 201 of the *Agra Tenancy Act* is not conclusive, even in a Revenue Court, but may be rebutted, as, for instance, by evidence showing that the plaintiff has not been in possession of the property in respect of which profits are claimed for more than twelve years before suit, and the defendants have openly denied the plaintiff's title for more than that period. **Dil Kunwar v. Udai Ram**, A. W. N. (1906), 316 = 4 A.L.J. 3 = 29 A. 148.

KNOX, J.

References :—F. A. F. O. No. 70 of 1904 : May 22, 1905, *Distd.*

(21) S. 201—Act No. I of 1872 (*Indian Evidence Act*), S. 4—Evidence—Record of plaintiff's name as a co-sharer—Presumption.

Per KNOX, J. (RICHARDS, J., dissentiente).—The presumption enjoined by section 201, clause (3), of the *Agra Tenancy Act*, 1901, is not conclusive, but may be rebutted by evidence offered to the contrary (a).

Per RICHARDS, J.—So far as a Revenue Court is concerned, it is bound to act upon the presumption created by section 201, clause (3), of the *Agra Tenancy Act*, 1901, subject only to the result of a suit in a Civil Court. **Dhanka v. Umrao Singh**, A. W. N. (1907), 43 = 4 A.L.J. 166.

Reference :—(a) A.W.N. (1906), 316, R.

7.—N.W.P. Acts.—(Continued).

Act II of 1901 N. W. P. (Tenancy).—(Concl'd).

(22) S. 201—Act No. I of 1872 (*Indian Evidence Act*), S. 4—Evidence—Presumption—Record of plaintiff's name as a co-sharer.

Held that the presumption enjoined by section 201, clause (3) of the *Agra Tenancy Act*, 1901, is not conclusive, but may be rebutted by evidence offered to the contrary. **Dhanka v. Umrao Singh**, A. W. N., 1907, 292 = 4 A. L. J. 802.

STANLEY, C. J., and BURKITT, J.

Reference :—29 A. 158, R.

Act III of 1901 (U.P. Land Revenue).

(1) S. 44—Applicability—See ACT II of 1901 (TENANCY, AGRA), No. 5, 4 A.L.J. 769.

(1-a) Ss. 66, 103 and 210—Suit asking for assessment of revenue on a certain area of land—Appeal—See ACT II of 1901 (AGRA TENANCY), No. 7, A.W.N. (1907), 225.

(2) Ss. 76 and 77—Superior proprietor—Contract for revenue with inferior proprietors—Effect of—Enhancement of revenue.

A contract was entered into between a superior and an inferior proprietor that the revenue to be paid for certain land by the inferior proprietor would be Rs. 48. The revenue of that land was, at the time of subsequent settlement, enhanced. Held that the inferior proprietor was not liable to enhanced revenue, so long as the superior proprietor did not take steps and get the contract rescinded, and until by an order under S. 76 or S. 78 a sub-settlement was made with the inferior proprietor. **Naubat Singh v. Narain Singh**, 4 A.L.J. 807.

BANERJI, J.

(3) S. 79—Under-proprietor, liability of the transferee from, to pay rent jointly—Arrears of rent due at the date of transfer—Rent Act (Oudh), S. 154, sub-s. (2).

Held, that a transferee from an under-proprietor of a portion of the holding becomes a co-sharer with him in the whole holding, jointly and severally liable to pay the whole rent under S. 79 of the *Land Revenue Act* [N.W.P. and Oudh], and under sub-sec. [2], S. 154 of the *Oudh Rent Act*, the transferee is also liable to pay any arrears of rent due in respect of the holding at the date of transfer. **Ujagar Lal v. Deputy Commissioner of Hardoi**, 10 O.C. 36.

SCOTT and CHAMBER, J.C.S.

7.—N.W.P. Acts.—(Continued).

Act III of 1901 (U.P. Land Revenue).—(Continued).

(3-a) S. 84—See No. 6, *infra*.

(3-b) S. 103—See No. 2, *supra*.

(4) Ss. 110, 111 and 233 (k)—*Partition—Objections not raised before Revenue Court—Suit in Civil Court for declaration of title—Jurisdiction.*

On the 12th of March, 1904, defendants applied to the Revenue Court for partition of their share in two mahals. Proclamation was issued on that application, calling upon the opposite party to appear on the 18th of April, 1904, and state their objections, if any, to the partition. The opposite party did not appear in the Revenue Court, but on the 20th of April, 1904, instituted a suit in a Civil Court against the applicants for partition, asking for a declaration of their exclusive possession over part of the property, the subject-matter of the defendants' application for partition in the Revenue Court. *Held* that the plaintiff's suit was not maintainable. **Nathi Mal v. Tej Singh**, A.W.N. (1907), 19J=4 A.L.J. 578=29 A. 604.

BANERJI and AIKMAN, JJ.

References:—23 A. 291, 28 A. 432, R.

(5) Ss. 110, 111 and 233 (k)—*Partition—Suit in Civil Court for declaration—Jurisdiction.*

Held that the prohibition contained in S. 233 (k) of the United Provinces Land Revenue Act, 1901, applies only to suits with respect to partitions, in which the plaintiff has had an opportunity of having his objections considered under S. 111 and has not availed himself of it. **Partab v. Niadar**, A.W.N. (1807), 175.

GRIFFIN, J.

References:—28 A. 432, F. 23 A. 291, R.

(5-a) S. 111—See Nos. 4 and 5, *supra*.

(6) Ss. 144 and 84 (b)—*Suit by co-sharers against lambardar—Lambardar entitled to 5 per cent. on the revenue—Agra Tenancy Act (II of 1901), S. 159—"Other dues"—Set off.*

In a suit for profits by co-sharers against a lambardar, the latter shall be remunerated by fees not exceeding 5 per cent. on the Government revenue, and he is also entitled to the village expenses incurred by him.

The expression "other dues" in S. 159 of the Tenancy Act includes lambardari dues. **Pokhar Singh v. Gulab Kunwar**, 4 A.L.J. 781.

GRIFFIN, J.

7.—N.W.P. Acts.—(Concluded).

Act III of 1901 (U.P. Land Revenue).—(Concluded).

(7) Ss. 184 and 233 (m)—*Civil and Revenue Courts—Jurisdiction—Suit to recover money erroneously collected for Government revenue.*

Held, that a suit to recover from a lambardar money erroneously realized by the lambardar, by means of proceedings taken under S. 184 of the United Provinces Land Revenue Act, lies in a Revenue Court, and not in a Civil Court. **Said-un-nissa v. Zahur Ali**, A.W.N. (1907), 156.

RICHARDS, J.

Reference:—1 A. 26, D.

(7-a) S. 210—See No. 2, *supra*.

(8) S. 233—*Declaration that certain land is exclusive property of appellant—Jurisdiction of Civil Courts to grant such declaration—Partition, private, effect of, as to property partitioned—See JURISDICTION (CIVIL COURTS), No. 7, 10 O.C. 204.*

(9) S. 233 (k)—*Partition—Suit brought in Civil Court pending partition proceedings in Revenue Court—Jurisdiction—Plaintiff not properly represented in Revenue Court.*

Pending proceedings for partition—including certain sir land—before a Revenue Court, the plaintiff instituted a suit in a Civil Court to recover possession of a share in the sir land. In the partition proceedings, the plaintiff, who was a minor, was not represented by any one legally competent to represent him. *Held* that section 233 (k) of the United Provinces Land Revenue Act, 1901, was not a bar to the maintenance of the suit in the Civil Court. **Awadh Bihari Lal v. Ishri Prasad**, A.W.N. (1907), 172=4 A.L.J. 662.

BANERJI, J.

References:—28 A. 432, F. 23 A. 291, R.

(10) S. 233 (k)—See Nos. 4, 5 and 9, *supra*.

(11) S. 233 (m)—See No. 7, *supra*.

8—Oudh Acts.

Act XVIII of 1876 (Oudh Laws).

(1) S. 5—*Suit for dower—Principle to be followed in determining dower debt—Wasika and Amanati notes, income derived from—See MAHOMEDAN LAW (DOWER), No. 2, 10 O.C. 241.*

(2) S. 9—*Owner of land on which a grove stands is a co-sharer—Non-payment of revenue—See PRE-EMPTION, No. 5 10 O.C. 86.*

8.—Oudh Acts.—(Continued).**Act XVIII of 1876 (Oudh Laws).—(Concluded).**

(8) S. 9, cls. (2) and (3)—Revenue-free land, suit for pre-emption of—Co-sharer, test of, being—See PRE-EMPTION, No. 20, 10 O.C. 257.

(4) Ss. 10, 11, 12 and 13—Suit for pre-emption—Notice, requirements of a valid, in the case of foreclosure of mortgages—Market value, when necessary to determine—Interest after the date when the decree was made absolute up to the date of the notice—Procedure to be followed when wrong amount entered in the decree.

Held, that Cl. (a) of S. 13 of the Oudh Laws Act refers only to cases in which no notice was issued at all or was issued in an irregular manner, and that Cl. (d) covers cases in which either the amount claimed by the mortgagee was not really due on the mortgage or was not claimed in good faith or exceeded the fair market value of the property mortgaged.

Held, further, that a mortgagee issuing a notice under S. 10 of the Oudh Laws Act is not entitled to claim interest up to the date of notice, but only up to the day on which the decree foreclosure was made absolute.

Held, also, that, where a mortgagee, while issuing a notice under S. 10, entered therein a sum which was not really due to him, it was unnecessary to consider whether the notice issued by him was issued at the proper time or was served properly. The decree must in such a case provide for payment by the pre-emptor on payment of what was due on the mortgage at the date of the order absolute or, if that exceeds the market value of the property, upon the payment of the market value. **Keoti Ram v. Lachman Prasad**, 10 O. C. 179.

CHAMIER, J.C., and SANDERS, A.J.C.

(5) S. 11—See No. 4, *supra*.

(6) S. 12—See No. 4, *supra*.

(7) S. 13—See No. 4, *supra*.

Act XXII of 1886 (Rent).

(1) Jurisdiction of Civil and Revenue Courts—Suit for recovery of occupancy holding by the heirs of a deceased tenant—Landlord and tenant, relationship of—Declaration of right of inheritance.

The plaintiffs, alleging themselves to be the heirs of a deceased occupancy tenant, brought a suit against the landlord in the Civil Court, for the possession of the holding, on the allegation that he had, after the death of the tenant,

8.—Oudh Acts.—(Continued).**Act XXII of 1886 (Rent).—(Concluded).**

taken illegal possession thereof and got the mutation of names wrongly effected in his favour. The landlord pleaded that the Civil Courts had no jurisdiction to try the suit and that such a suit was exclusively reserved for the Revenue Courts.

Held, that the real question for decision in the case was, whether the plaintiffs were entitled to succeed to the right of occupancy as heirs of the deceased tenant, that, until such question was determined, no relationship of landlord and tenant could be established, to enable the plaintiffs to claim relief in the Revenue Court (a); and the suit was, therefore, rightly instituted in the Civil Court. **Raghubar Dayal v. Chandan**, 10 O.C. 28.

CHAMIER and EVANS, J.CS.

References:—(a) 1 O.C. 172 and 2 N.W.P.H. C.R. 86, F.

(2) S. 3, cl. (3)—Suit for trees and land—Rent Court, suit exclusively triable by—See JURISDICTION (CIVIL COURTS), No. 8, 10 O.C. 188.

(8) S. 7 A—Contract forbidden by law—Relief where a person deliberately enters into such a contract—Remedy after the contract has been executed—Suit for setting aside sale where ex-proprietary rights claimed.

When, along with some zemindari, certain *sir* land was sold, and the vendor undertook not to claim occupancy rights therein under S. 7-A of the Oudh Rent Act, but subsequently claimed and obtained those rights, *held*, that the purchaser was not entitled to compensation in respect of the *sir* land. **Bhikham v. Ghaal Ram**, 10 O.C. 243.

CHAMIER, J.C. and SANDERS, A.J.C.

References:—19 A. 35, 22 A. 205, R.

(4) S. 72—Right of distraint—See LANDLORD AND TENANT, No. 10, 10 O.C. 41.

(5) S. 132—Limitation—Arrears of rent—Assignee of arrears of rent.

Held, that the limitation of three years prescribed by S. 132 of the Oudh Rent Act, with respect to suits brought for arrears of rent, applies to all such suits, whether brought in the Civil Court or in the Rent Court. **Babu Motichand v. Syed Riyasat Hossain**, 10 O. C. 21.

SCOTT, J.C.

8.—Oudh Acts.—(Concluded).**Act XXII of 1886 (Rent).—(Concluded).**

Reference :—5 M.I.A. 284, R,

(6) S. 154 (2)—Liability of transferee from under-proprietor to pay rent jointly—Arrears of rent due at the date of transfer—See ACT III of 1901 (N.W.P. AND OUDH LAND REVENUE), No. 3, 10 O.C. 86.

9.—Punjab Acts.**Act IV of 1872 (Punjab Laws).**

(1) S. 5—Applicability of—See CUSTOMS (PUNJAB), No. 64, 68 P.W.R. 1907.

(2) S. 10—Distinction between agricultural and non-agricultural land—Land in village and land in town—See PRE-EMPTION, No. 15, 51 P.R. 1907.

(3) S. 11—See CUSTOM (PUNJAB), No. 55, 17 P.W.R. 1907.

(4) S. 12 (B)—See CUSTOM (PUNJAB), No. 49, 7 P.W.R. 1907.

Act XVIII of 1884 (Punjab Courts).

(1) S. 3—Suit for compensation for breach of betrothal contract—"Unclassed" suit—Appeal to District Judge—See ACT IX of 1887 (PROVINCIAL SMALL CAUSE COURTS), No. 7, 125 P.R. 1907.

(2) S. 40 (b)—*Suit by reversioner for a declaration that a mortgage by widow will not affect his interest—Thirty times jama rule—Value of the property for purposes of appeal.*

A suit for a declaration that a certain mortgage-deed, in which the consideration was stated at Rs. 800, but the land mortgaged by it is worth only Rs. 60-3-6 according to the thirty times *jama* rule, shall not affect the reversionary rights of the plaintiff, is in effect a suit for a declaration that the plaintiff is reversioner to land, worth Rs. 60-3-6 according to the said rule, regardless of any incumbrances created by the widow (a). The value of the suit is the value of the land calculated at 30 times the *jumma*, and not the amount of the incumbrances.

By the decree in such a suit, the plaintiff will get the land on the death of the widow, without reference to the mortgage or its precise amount. No appeal from the order of the lower appellate Court lies under S. 40 (b) of the Act, as the value of the suit and the property involved must be taken as less than Rs. 250 (b). **Hari Singh v. Nika Singh**, 42 P.R. 1907.

JOHNSTONE, J.

9.—Punjab Acts.—(Continued).**Act XVIII of 1884 (Punjab Courts).—(Continued).**

References :—(a) 145 P.R. 1892, F. (b) 145 P.R. 1892, F; 24 P.R.* 1903 (F.B.), D.

(3) S. 40 (b)—Suit for declaration that sale of ancestral agricultural land would be void after alienor's death—See VALUATION OF SPIT, No. 4, 60 P.R. 1907 (F.B.).

(4) Ss. 40 and 70—*Further appeal—Revision—Jurisdiction—"Decree involves directly some claim to, or question respecting property of like value"—Burden of proof—Consideration for registered deed—Evidence—Partition of holding—Alienation of occupancy rights in favour of landlord—Suit by heir.*

Held, following 24 P.R. 1903 (F.B.), that, in a suit for possession as mortgagee, the sum to be paid eventually for redemption under the lower appellate Court's decree governs the course of appeal in the Chief Court.

Held also, that, in the case of a registered mortgage deed, the burden of proving want of consideration lies on the mortgagor or the person who claims under him.

Held, on the evidence on record, that the private partition of the holding in suit by the tenants was proved to have been made, though it was shown joint in the Revenue records.

Held, also, on the analogy of 31 P.R. 1896 (F.B.), that an ordinary heir to an occupancy tenant under S. 59 of the Punjab Tenancy Act cannot contest the mortgage of the tenancy by his predecessor to the landlord, on the score of want of necessity, when the tenant could surrender the tenancy to the landlord, *gratis*.

If an occupancy tenant mortgages his holding to an outsider and then dies, without any heirs capable of succeeding under S. 59 of Punjab Tenancy Act, the tenancy becomes extinct. **Bhag v. Buta Singh**, 19 P.L.R. 1907.

JOHNSTONE and HURRY, JJ.

(5) S. 70—*Revision—Civil cases—Appeal triable by higher Court decided by lower Court.*

When an appeal triable by a higher Court is heard and decided by a lower Court, the Chief Court would, in the exercise of its revisional jurisdiction, set aside the decree passed on appeal, on the ground of want of jurisdiction in the appellate Court; and the fact that the party, who applies for revision, had himself filed the appeal in the lower Court does not cure

9.—Punjab Acts.—(Continued).**Act XVIII of 1884 (Punjab Courts).—(Contd.).**

the defect of jurisdiction. **Colonel G. F. Wilson v. Charaga Mal**, 16 P. L. R. 1907.

LAL CHAND, J.

(5-a) S. 70—See No. 4, *supra*.

(b) S. 70 (1) (a)—*Erroneous finding on a point of limitation—Whether Chief Court can interfere in revision.*

The lower Court dismissed a suit, as barred under the Limitation Act, whereas the Punjab Loans Limitation Act (I of 1904) was in fact applicable to the suit. The application to the case, of the Limitation Act of 1877, which obviously did not apply, makes the case fall within the class of cases where the Chief Court can, and ought to, interfere in revision (*a*). **Parmeshari Das v. Kaka**, 121 P. R. 1905 = 64 P. L. R. 1907.

CHITTY, J.

References :—(*a*) 26 P. R. 1889, *F.* 97 P. R. 1905, *D.* 90 P. R. 1904, *R.*

(7) S. 70 (1) (a)—*Erroneous finding as to question of limitation, whether precludes revision.*

A finding that an application or a suit is barred by limitation, does not necessarily, in every case, preclude the remedy by revision, if it does not appear that all the necessary matters essential for arriving at such conclusion have been fully and properly taken into consideration. In the case of an application for setting aside an *ex parte* decree, before the stringent provisions of Art. 164 could be applied to it, it must be clearly found that there was a proper and valid issue of process in conformity with the provisions of the Code of Civil Procedure (*a*), and the process issued, under S. 263 of the Code contemplating an attachment of judgment-debtor's property, an order directed merely against the debtor of the judgment-debtor and omitting to prohibit the creditor from receiving the debt is not a proper and valid process and such omission is a material irregularity within S. 70 (*a*) of the Act so as to justify interference on revision thereunder. **Sadha Ram v. Karam Chand**, 118 P. R. 1906 = 79 P. L. R. 1907.

LAL CHAND, J.

References :—(*a*) 5 P. R. 1897, and 32 P. R. 1878, *R.*

9.—Punjab Acts.—(Continued).**Act XVIII of 1884 (Punjab Courts).—(Contd.).**

(8) S. 70 (1) (b)—*Computation of limitation—Deduction of time necessary for obtaining copies of judgments, etc.—Applicability of S. 12, Limitation Act—Sufficient cause.*

A revision-petition presented to the Chief Court, more than 90 days after the date of the lower appellate Court's decree, cannot be entertained under cl. (b) of S. 70 (1) of the Punjab Courts Act, as it is time-barred. The days occupied in obtaining copies of the judgment and decree of the lower appellate Court cannot be deducted in computing the time for the above application, as S. 12, Limitation Act, does not apply to the case. The only question is whether the applicant satisfies the Court that he had sufficient cause for not making the application within the prescribed period. But the mere fact that he had to wait two days for the copies cannot constitute "sufficient cause" for his not making the application, when, in fact, he got the copies sufficiently early and had thus ample opportunity to make his application long before the expiry of the prescribed period of 90 days. **Kishen Dial v. Ram Ditta**, 20 P. R. 1907 = 48 P. L. R. 1907 (Overruled by 114 P. R. 1907).

RATTIGAN, J.

(9) S. 70 (1) (b), *Prov. 1—Time spent in obtaining copies of judgment in decree—Limitation Act, S. 12—Alienation by Hindu widow of husband's self-acquired property—Right of reversioner to question validity of such alienation.*

The provisions of S. 12 of the Limitation Act are applicable in computing the period of 90 days specified in S. 70 (1) (b), *Prov. 1* of the Act, and the applicant is entitled to exclude the time spent in obtaining the copies of judgment and decree of the lower appellate Court (*a*), though it may not be necessary for the applicant, under S. 70 of the Act, to file such copies (*b*).

A widow, under Hindu Law, succeeds to a mere life estate, with a restricted power of alienation, and it is altogether immaterial whether the property inherited and alienated by the widow was a self-acquired or ancestral property of her husband. The reversioners have the same right, in either case, to contest the alienation. **Kirpa Ram v. Rakhi**, 114 P. R. 1907.

RATTIGAN and LAL CHAND, JJ.

9.—Punjab Acts.—(Continued).

Act XVIII of 1881 (Punjab Courts).—(Concl'd).

References :—(a) 20 P.R. 1907, overruled ;
(b) 146 P.L.R. 1906, R.

Act XVI of 1887 (Punjab Tenancy).

- (1) *Acquisition of occupancy rights by descendants of one of the founders against another.*

The members of the original proprietary body of a village, who are descendants of one of the founders of the village, cannot acquire occupancy rights against another founder, under S. 5 (1) (c), Punjab Tenancy Act, 1887. **Hira v. Budha**, 1 P.R. 1907 (Rev.) = 13 P.L.R. (Rev.) 1907 = 1 P.W.R. 1907 (Rev.).

WALKER, F.C.

(2) Right of occupancy tenant to substitute another in his place—Rights of proprietor—See PUNJAB ACT II OF 1905 (PRE-EMPTION, PUNJAB), No. 4, 136 P.R. 1907.

- (3) S. 4 (1)—*Ghair-mumkin land attached to a well, suit for possession of—Jurisdiction—Chief Court's power to revise findings on facts relating to jurisdiction.*

Land, which is outside the *abadi* and is attached to a well, has *khurlis* and is entered as *ghair-mumkin*, and has *bhusa* stacked on it, is agricultural land and fulfils the requirements of S. 4 (1) of the Act. A suit for possession of such land is a land suit, and the District Court is not competent to hear the appeal in the case.

In order to decide whether the District Court had jurisdiction, the Chief Court has power to go into all the matters pertaining to the conditions of cognizance by the lower Court of the appeal decided by it (a). **Gandu Singh v. Natha Singh**, 12 P. R. 1907.

CHATTERJI, J.

Reference :—(a) 54 P.R. 1896, R.

- (4) Ss. 4, cl. (12), 77 (3) (j)—*Hooq-buha—Village-cess—Jurisdiction of Civil and Revenue Courts.*

Customary dues of the nature of *Hooq-buha*, levied by the proprietary body of a village from non-proprietary residents, fall within the definition of village-cess contained in cl. (12) of S. 4 of the Tenancy Act (a). Suits for the recovery of these dues are therefore cognizable by the Revenue Courts under S. 77 (3) (j) of the Act. **Shahya v. Karm Khan**, 95 P.R. 1907 (Foot-note), p. 458.

ROBERTSON and KENSINGTON, JJ.

9.—Punjab Acts.—(Continued).

Act XVI of 1887 (Punjab Tenancy).—(Cont'd.)

References :—(a) 49 P.R. 1891; 11 P.R. 1890 (Rev.) F.

- (5) S. 6—*Occupancy rights belonging to a religious institution—Succession to such rights.*

The mahant for the time being with his *chelas* must be held to be a "person" under S. 2, Punjab General Clauses Act, and, therefore, to be capable of being a "tenant" within the meaning of the Punjab Tenancy Act. Consequently, where occupancy rights belong to a religious institution, they pass on, on the death of the last incumbent, to that *chela* who succeeds him in the representation of the institution. **Sher Singh v. Saya Rama**, 2 P.R. 1907, (Rev.) = 36 P.L.R. 1907 = 5 P.W.R. 1907, (Rev.).

WALKER, F. C.

Reference.—22 P.R. 1896, *Expl.*

(6) Ss. 45 and 77—Civil suit lies for a declaration that tenant is owner after dismissal of his suit under S. 45 (5) of the Act, by a Revenue Court—See JURISDICTION (OF CIVIL COURTS), No. 6, 56 P.W.R. 1907.

- (7) Ss. 53 and 59—*Succession to occupancy tenancy—Adopted son of occupancy tenant associating strangers with him—Right of collateral heirs of the adoptive father to succeed to adopted son dying childless.*

While, in cases of contest between a landlord and others regarding succession to, or alienation of, a tenancy, Ss. 53 and 59 of the Act must be regarded ; on the other hand, in cases of conflict between occupancy tenants and those who would be their natural heirs under custom, or, between persons claiming succession to an occupancy tenancy, the holder of which has died, and alienees of the occupancy rights, the same rule of custom should presumably be followed as regulates alienation of, and succession to, land held in ownership (a.)

A, the adopted son, and the donee of an occupancy tenant, died sonless leaving a widow, after having formally associated the defendants with him in the tenancy. After the death of the widow, a dispute arose between the collateral heirs of the adoptive father of A and the defendants.

Held that, if A was treated as an adopted son, his heirs, under custom and S. 59 (2) of the Act, are his adoptive father's nearest male agnates, and that, if he was treated as a donee, the gift, under custom, reverts, upon failure of his male line, to the heirs of the donor.

9.—Punjab Acts.—(Continued).**Act XVI of 1887 (Punjab Tenancy).—(Contd.).**

Held, also that there was no time bar against the plaintiffs, inasmuch as they could not sue for possession until the death of the widow of **A. Saïda v. Ismail**, 76 P.R. 1907.

JOHNSTONE, J.

References:—(a) 68 P.R. 1894, 89 P.R. 1898 (F.B.), 69 P.R. 1900, 12 P.R. 1904, and 109 P.R. 1894, R.

(8) Ss. 53 and 60—Occupancy rights, sale of, without landlord's consent—Delay by landlord in bringing suit—Presumption of acquiescence.

The fact that a landlord makes a delay of 15 months in bringing a suit for cancelling a transfer, made in contravention of the provisions of the Tenancy Act, cannot raise a presumption that the landlord had acquiesced in the transfer (a). **Mohar Singh v. Jhanda**, 3 P.R. 1907 (Rev.) = 4 P.W.R. (1907), (Rev.).

WALKER, F.C.

References:—(a) 8 P.R. 1904 (Rev.), 1 P.R. 1893 (Rev.); 2 P.R. 1898 (Rev.), R.

(9) S. 59—Meaning of "occupied"—See OCCUPANCY RIGHTS, No. 3, 46 P.W.R. 1907.

(9-a) S. 59—See No. 7, *supra*.

(10) Ss. 59, 60, &c.—Gift by a chhimba occupancy tenant to his daughter's sons—Suit by reversioner, maintainability of, after being successfully challenged by the landlord—See CUSTOMS (PUNJAB), No. 62, 60 P.W.R. 1907.

(10-a) S. 60—See Nos. 8 and 10, *supra*.

(10-b) S. 77—Suit by occupancy tenants for declaration that the village *shamiat* is not partible—See JURISDICTION (OF CIVIL AND REVENUE COURTS), No. 3, 144 P.R. 1907.

(10-c) S. 77—See No. 6, *supra*.

(11) S. 77, cl. (3) (j)—**Kudhi Kamini**—Village cess—Suit to recover—Jurisdiction of Civil and Revenue Courts.

Kudhi Kamini is a village-cess within the meaning of S. 77 (3) (j) of the Punjab Tenancy Act, and a suit to recover such dues is excluded from the jurisdiction of the Civil Court (a). **Raj Sarup v. Hardawari**, 95 P.R. 1907.

ROBERTSON and KENSINGTON, JJ.

References:—(a) 95 P.R. 1907; 49 P.R. 1891; 11 P.R. 1890 (Rev.); judgment in Civil Procedure Code, No. 11 of 1904, F.

(11-a) S. 77 (3) (j)—See No. 4, *supra*.

9.—Punjab Acts.—(Continued).**Act XVI of 1887 (Punjab Tenancy).—(Contd.).**

(12) S. 77 (3) (n)—Suit on a bond executed for arrears of rent—Jurisdiction of Revenue and Civil Courts.

Where a suit is based on a bond, the consideration for which is arrears of rent, the suit is cognizable by a Civil Court, as being a claim based upon a bond, the claim for rent having merged in the right given by the bond, which was given in satisfaction of the claim for rent. The case does not fall under S. 77 (3) (n) of the Act, so as to give jurisdiction to a Revenue Court. **Amrit Lal v. Bhagwana**, 41 P.R. 1907.

JOHNSTONE and RATTIGAN, JJ.

References:—Civil Reference No. 95 of 1905, F; Civil Reference No. 55 of 1897, Diss.

(13) S. 100—Proceeding in a Revenue Court having jurisdiction - Commissioner on appeal holding the case not proved, but suggesting the registration of the Revenue Court's decree as that of the Civil Court—Commissioner's power of reference.

It is well established by authority that, as a general rule, the jurisdiction of a Court, in which a suit is instituted, is to be determined by reference to the allegations contained in the plaint, supplemented in some instances by statements made by the plaintiff in the course of pleading (a).

Where, from the allegations made in the plaint, it was clear that the Assistant Collector had jurisdiction to hear and determine the suit, which was clearly one cognizable by a Revenue Court, the Commissioner, coming to the conclusion that the plaintiff had not proved his case, thereby, differing from the lower Court, referred the case to the Chief Court, with the suggestion that the decree of the Assistant Collector should be registered as the decree of the District Judge, on the ground that the plaintiff could have succeeded in the Civil Court on a different allegation.

Held, that, upon the findings recorded by the Commissioner, it was not competent for him to make a reference to the Chief Court under S. 100 of the Punjab Tenancy Act and that the Chief Court cannot make order suggested by him. **Kalu v. Parta Mal**, 45 P.R. 1907.

JOHNSTONE and SHAH DIN JJ.

References:—(a) 22 P.R. 1894, 28 P.R. 1895, 55 P.R. 1896 and 92 P.R. 1902, R.

9.—Punjab Acts.—(Continued).**Act XVI of 1887 (Punjab Tenancy).—(Concl'd).**

(14) *Ss. 111 and 112, Scope of,—Right of persons to settle, by written agreement, a course of succession different from that prescribed by the Act—Occupancy rights—Succession.*

*Ss. 111 and 112 of the Punjab Tenancy Act are an amendment of S. 2 of the Tenancy Act of 1868. S. 2 of the old Act saved all written agreements between landlord and tenants and gave the force of agreements to all entries in the Settlement Records made and sanctioned prior to the year 1871, as regards questions of rent, ejectment, alienation, succession and compensation. The intention of the Act of 1887 was to curtail the right of persons to contract themselves out of the terms of the Act, especially as regards rent, ejectment and compensation, but the validity given by the law of 1868 to entries in Settlement Records prior to 1871 was maintained, and the right of persons in future to contract themselves out of the terms of the Act, except as regards matters above-mentioned, was declared. Parties can, therefore, by written agreement, either prior or subsequent to 1871, settle on a law of succession different from the succession prescribed in the Act. According to S. 112, an entry in a *wajib-ul-arz*, prior to 1871, with respect to the succession to land, in which a right of occupancy subsists is, an agreement to which the provisions of S. 59 of the Act does not apply (a). **Puran v. Mamun**, 180 P.R. 1907.*

CLARK, C.J.

Reference :—(a) 98 P.R. 1894 (F.B.), R.

(15) S. 112— See No. 14, *supra*.

Act XVII of 1887 (Punjab Land Revenue).

S. 158.—Suit by occupancy tenants for declaration that the village *shamilat* should be exempted from partition—See JURISDICTION (OF CIVIL AND REVENUE COURTS), No. 3, 144 P.R. 1907.

Act XX of 1891 (Punjab Municipal Act).

(1) *Ss. 94 and 95—Scope of the sections—Application for construction of building including a projection encroaching upon a street—Implied sanction from silence for six weeks—Applicability of S. 95 to encroachments attached to new buildings.*

If a man applies for sanction under S. 92 of the Act, for the construction of a new building, which includes a projection, encroaching upon the street, as a part of a larger building, the building of such projection requiring permission

9.—Punjab Acts.—(Continued).**Act XX of 1891 (Punjab Municipal Act).—(Concluded).**

in writing under S. 95 of the Act, he cannot shelter himself under sanction by silence under S. 92, against action under S. 95. The mere fact that sanction for the erection of a projection encroaching upon a street is applied for and included in an application for the construction of a building upon one's own site cannot extend the implied sanction by silence for six weeks under S. 92, to cover acts requiring written sanction under S. 95 (a).

S. 95 of the Act applies not only to encroachments and obstructions which are added to old ones, but also to those which are attached to new buildings.

An encroachment upon a Municipal property, not being street or drain, sewer or aqueduct, would not come within the purview of S. 95 (b). **The Municipal Committee of Delhi v. Devi Sahai**, 62 P.R. 1907.

ROBERTSON and LAL CHAND, JJ.

References :—(a) 52 P.R. 1900, 27 P.R. 1901 and 27 P.R. 1904, Cr. R. (b) 45 P.R. 1905, R.

(1-a) S. 95—See No. 1, *supra*.

(2) S. 120 (c)—Court's power to interfere with Municipal orders—See JURISDICTION (OF CIV. COURTS), No. 2, 58 P.R. 1907.

Act I of 1900 (Punjab Land Alienation).

(1) *Alienation of ancestral land—Limitation—Son born subsequent to alienation—Indian Limitation Act, Ss. 7 and 9.*

The Punjab Limitation Act was intended to apply to all cases falling within its purview instituted after its coming into force.

Under the Punjab Limitation Act, the period of limitation for a suit, by a son governed by the Customary Law of the Punjab, to have an alienation of ancestral land by the male proprietor declared void, begins to run, from the date on which the alienation was attested by the Revenue officer, having jurisdiction, in the Register of Mutations, mentioned under the Punjab Land Revenue Act, 1887.

Where time has begun to run under that Act, a son of such proprietor, born after the alienation, cannot, in view of S. 9 of the Indian Limitation Act, take advantage of S. 7 of the Act on the ground of minority (a). **Inayat Khan v. Shabu**, 108 P.R. 1907.

JOHNSTONE and RATTIGAN, JJ.

References :—(a) 53 P.R. 1903, 76 P. R. 1906, R; 14 M.L.J. 209, not approved.

9.—Punjab Acts —(Continued).**Act I of 1900 (Punjab Land Alienation).—(Concluded).**

- (2) *Limitation—Sale of ancestral revenue paying land—Suit by son to contest the alienation and recover possession of the land after father's death—Custom.*

In 1904, S sued to recover possession of ancestral land sold by his father, an agriculturist, in 1858, on the ground that the sale was not binding upon him according to custom.

Held, that as the father of S died after 21st day of June, 1900, the date of the Punjab Limitation Ancestral Land Alienation Act I of 1900 coming into force, the plaintiff's claim was clearly barred by limitation. **Jamal-ud-Din v. Khuda Baksh**, 25 P.W.R. 1907 = 44 P.L.R. 1907.

RATTIGAN and CHITTY, JJ.

- (3) Art. 2—Suit for possession by a reversioner entitled to possession after widow's death—Alienation by the last male-holder—Limitation—See Limitation Act, No. 111, 145 P.R. 1907.

Act IV of 1900 (Punjab Descent of Jagirs).

- (1) S. 8, cl. 3—*Assignment of land revenue—Sub-assignment—Liability to be attached in execution—Sanction by Government for sub-assignment—Court's power to question its validity.*

The section is in very general terms and refers to "any assignment of land revenue" and is not limited to assignment made by Government only. It includes also sub-assignments by private individuals made with the sanction of the Government. The effect of the sanction is to convert the assignment into one made, if not directly, at least indirectly, by Government. Such sub-assignment is, under cl. (3) of the section, incapable of being attached in execution of a decree, just as the assignment itself.

If Government recognises, as valid, an assignment of land revenue, and proceeds to take action under S. 8 with regard to such assignment, it is not open to the Court to hold that such action is invalid because the assignment is one which, in the opinion of the Court, Government should not have recognised as such. That is a matter solely for the discretion of Government, not for adjudication by Courts. **Bhagwan Das v. Ram Das**, 117 P.R. 1907.

CHATTERJI and RATTIGAN, JJ.

9.—Punjab Acts.—(Continued).**Act XIII of 1900 (Punjab Alienation of Land).**

- (1) *Application of, to suits for lands purchased before the Act.*

Where the right to claim a land in dispute had accrued to the plaintiff before the Land Alienation Act came into force, the subsequent passing of the Act could not deprive him of his vested rights under the sale-deed, which was completed prior to the Act. **Sundar Lal v. Ram Singh**, 10 P.R. 1907.

LAL CHAND, J.

References :—38 P.R. 1904, 20 P.R. 1905, R.

- (2) *Mortgage in favour of agriculturist—Allegation that the mortgage was intended in favour of non-agricultural money-lenders—Validity of mortgage.*

The Civil Courts cannot refuse to enforce a mortgage, perfectly legal on the face of it, executed in favour of an agriculturist, on the mere assumption that the mortgage was intended for the benefit of certain non-agricultural money-lenders, who are prohibited, by the Punjab Land Alienation Act (XII of 1900), from taking a mortgage and obtaining possession, unless it is in one of the forms specified in the Act. **Jahan Khan v. Dalla Khan**, 142 P.R. 1907.

ROBERTSON and SHAH DIN, JJ.

- (3) S. 9—*Mortgage by member of agricultural tribe—Duty of party applying for reference under S. 9 to prove that he is a member of an agricultural tribe—Failure to prove, effect of—Ground for revision.*

It is no doubt the duty of the Court to make a reference to the Deputy Commissioner under S. 9, Punjab Land Alienation Act, in case of a mortgage by a member of an agricultural tribe. But it is for the party applying for such reference, to allege and prove that he is a member of an agricultural tribe. If the party making the application does not move the Court to order any such inquiry, and the Court refuses to recognise him as such, it cannot be said that the Court has failed to exercise its jurisdiction, or has acted with irregularity in the exercise of its powers; and the Chief Court cannot interfere in revision under S. 70 (1) (a), Punjab Courts Act, 1884. **Uda v. Mul Chand**, 4 P.R. 1907 = 20 P.W.R. 1907.

RATTIGAN and LAL CHAND, JJ.

- (4) S. 9 (3)—*Effect on foreclosure under Reg. XVII of 1906—Civil Court's duty to refer to*

9.—Punjab Acts.—(Continued).

Act XIII of 1900 (Punjab Alienation of Land). —(Concluded).

Collector—Collector's refusal, effect of—See MORTGAGE (CONDITIONAL SALE), No. 1, 98 P.R. 1907.

Act II of 1905 (Pre-emption).

(1) Scope.

The act is retrospective. It applies to every claim to right of pre-emption, whether that right accrued before or after its commencement. *Bahadur v. Alla*, 90 P.R. 1907.

REID, J.

References :—103 P.R. 1901, 90 P.R. 1904, R.

(2) Ss. 2, cl. (3) and 14—Pre-emption—Suit commenced since the passing of the Act—Pre-emptor and vendee being co-sharers—Priority—Co-emption.

Where a sale took place before the passing of the Act, but the suit for pre-emption was filed after the Act had come into force, the claim should, under cl. 8, S. 2, be decided in accordance with the provisions of the Act.

S. 14 deals with several pre-emptors claiming in respect of the same property and does not provide for the case of a pre-emptor claiming against a vendee, who has equal rights with him.

Where the pre-emptor and vendee are both co-sharers in a *Khatta*, the pre-emptor has no priority over the vendee and is not entitled to claim pre-emption, by himself, against the vendee of the whole or any part of the property sold (a).

The right of pre-emption attaches to the entire bargain to which the right applies, and no change has been made in this respect by the Pre-emption Act. The claim, whether joint or several, must be for the entire property to which the right attaches.

The present Act has made no provision for co-emption. *Khan Zaman v. Fatteh Sher*, 88 P.R. 1907.

CHATTERJI and JOHNSTONE, JJ.

References :—(a) 54 P. R. 1882 and 94 P. R. 1904 (F.B.) R.

(3) Ss. 2 (3), 28 and 29—Scope of Ss. 28 and 29—Rights already accrued before passing of the Act—Section applicable—Limitation.

9.—Punjab Acts.—(Continued).

Act II of 1905 (Pre-emption).—(Continued).

S. 30 of the Act is the substantive section fixing the period of limitation and, by S. 2 (3), it applies to "every claim to the right of pre-emption, whether the right has accrued before or after its commencement."

S. 28 simply provides a period of one year, during which, in spite of the new period provided by S. 29, parties might exercise right of pre-emption, which had already accrued to them, and which might be barred under S. 29. *Ladhu v. Sardar Muhammad*, 131 P. R. 1907.

CLARK, C.J.

(4) Ss. 3 (5) and 4—Construction of agreement—Agreement creating perpetual lease—Right of pre-emption—Act XVI of 1887—Right of occupancy tenant to substitute another in his place.

By an agreement certain proprietors in a village made a member of an agricultural tribe, residing in another village, an occupancy tenant, in consideration of money payment and a fixed annual rent. The agreement also stipulated that, in case the tenant died without issue, the land should revert to the proprietors. Held that the agreement was not a sale, but a mere permanent lease, and was not, therefore, subject to any right of pre-emption (a).

If a person executing a conveyance does not purport to transfer his rights and interests in full and permanently, but only a part or for a period, and reserves the rest for himself, such a transfer is not a transfer by way of sale.

Under the Tenancy Law, a proprietor has an absolute right either to prevent an alienation of occupancy rights or have a preferential right to purchase, where the right is transferable, without his consent. It is, therefore, clear that an occupancy tenant is incapable of substituting another person for himself as an occupancy tenant, without the consent of the landlord. *Bhagwan Das v. Sidher*, 196 P. R. 1907.

JOHNSTONE and LAL CHAND, JJ.

References :—(a) 15 C. 184, 25 W. R. 43, 8 W. R. 100, R; 43 P. R. 1892, 67 P. R. 1874, 196 P. R. 1882, 120 P. R. 1888, 179 P. R. 1888, D.

(4-a) S. 4.—See No. 4, *supra*.

(5) S. 11—Pre-emption, suit for—Plaintiff, member of the same tribe with vendor—

9.—*Punjab Acts.*—(Concluded).

Act II of 1905 (Pre-emption).—(Concluded).

Custom—Punjab Alienation of Land Act (XIII of 1906), S. 2.

In a suit for pre-emption under S. 11 of the Punjab Pre-emption Act against the vendee, instituted on the ground that the plaintiff-claimant for pre-emption was a member of the same agricultural tribe with the vendor, it was held that the plaintiff is entitled to the right of pre-emption, in respect of the land in question, although the vendee was an "agriculturist" within the meaning of S. 2 of Act XIII of 1906 (Punjab Alienation of Land Act). **Mahmud v. Nur Ahmad**, 101 P.R. 1907 = 70 P.W.R. 1907.

KENSINGTON and LAL CHAND, JJ.

(6) *Ss. 12 and 13, cl. (2)—Pre-emption—Shops in villages—Section applicable.*

Sub-sec. 2 of S. 13 of the Act does not apply to shops in villages, and a right of pre-emption exists in respect of them subject to the provisions of S. 12. **Kirparam v. Khushali Mal**, 80 P.R. 1907.

CHATTERJI and JOHNSTONE, JJ.

(6-a) S. 13, cl. (2)—See No. 6, *supra*.

(6-b) S. 14—See No. 2, *supra*.

(6-c) S. 28—See No. 3, *supra*.

(7) *Ss. 28 and 29—Scope of—Persons having the right to sue at the commencement of the Act—Right to sue after the commencement of the Act—Change of rule as to custom of pre-emption.*

S. 28 of the Pre-emption Act is intended to provide a period of at least one year for all persons, who had the right to sue at the commencement of that Act. S. 29 provides for the period of limitation in all cases, in which the right to sue accrues after the commencement of the Act.

All that the limitation clause deals with is the right to sue, and not the substantive right on which the suit is based.

The new Act, by relieving a person from the burden of proving a special custom for the enforcement of the right of pre-emption and by conferring it on him by statute, does not affect his right to sue, but only affects the subsequent course of the suit. **Thakaria v. Daya Ram**, 148 P.R. 1907.

ROBERTSON and SHAH DIN, JJ.

(8) S. 29—See Nos. 3 and 7, *supra*.

Actionable claim.

(1) Meaning of—See TRANSFER OF PROPERTY ACT, No. 10, 17 M.L.J. 87.

(2) Benefit of executory contract whether—See TRANSFER OF PROPERTY ACT, No. 1, 11 C.W.N. 566.

Actionable wrong.

See TORTS.

Administration bond.

Object of taking,—Security, sufficiency of—Probate and Administration Act, S. 78—See PROBATE, No. 1, 6 C.L.J. 458.

Administrator.

Agent appointed by, liability of—See PRINCIPAL and AGENT, No. 1, 30 M. 243.

Administrator-General.

(1)—holding an estate, what payments can be made by—See ACT II OF 1874 (ADMINISTRATOR-GENERAL), No. 1, 11 C.W.N. 193.

Administrator-General's Act.

See ACT II OF 1874.

Admission.

(1)—of transaction effected by registrable but unregistered instrument, effect of—Admission on point of law—Estoppel—See SALE, No. 2, 3 N.L.R. 72.

(2) The express—of a party to a suit—Right of party to show that those admissions were mistaken or not true—See BURDEN OF PROOF, No. 1, 4 A.L.J. 102. (P.C.)

Adoption.

(1) Proof of—See RES JUDICATA, No. 23, 6 C.L.J. 13. (P.C.)

(2) Distinction between "invalid" adoptions and "inherently invalid" adoptions—See CUSTOM (PUNJAB), No. 1, 1 P.R. 1907.

(3) Jains—Authority of widow to adopt—Adoption of married man—See JAINS, No. 1, A.W.N. (1907), 121.

(4) Rivaj-i-am providing only for adoption of collateral—Adoption of stranger, invalid—See CUSTOMS (PUNJAB), No. 65, 77 P.W.R. 1907.

Adverse possession.

(1) Shamlat land, Implied transfer of—Shamlat land is joint undivided property and the possession of one co-sharer is not, in the absence of special circumstances, adverse against the other co-sharers.

Adverse possession.—(Continued).

In determining the question whether *shamilat* land passed to the vendee on a sale of *malik* rights, one point of importance is the area and value of *shamilat* as compared with *maliki* land.

When the *shamilat* land was of no great value and the sale included *jumla haquq dakhili wa khariji*, *mai jumla haquq biswadari*—

Held, that a transfer of share in *shamilat* was implied by the sale. **Ahmad v. Karori Mal**, 4 P.L.R. (1907) = 49 P.W. R. 1907.

JOHNSTONE and CHITTY, JJ.

- (2) *Possession of mother as guardian of her minor son after death of last male owner, nature of.*

Where the properties of the last male owner vested, on his death, in his son, who was a minor at the time under the custody and guardianship of his mother, her possession of the properties must be taken to have been on behalf of the minor, and not adverse to him. Possession is never to be considered adverse, if it can be referred to any lawful authority. **Sreeramulu Naidu v. Andalammal**, 17 M.L.J. 14 = 30 M. 145.

WHITE, C.J., and SUBRAHMANYA IYER, J.

- (3) *Claims hostile to each other—Landlord and tenant—Receipt of rent—Creation of relationship—Dispossession.*

Possession of property by one party cannot be adverse to another within the meaning of the Limitation Act, unless the claims of the parties are hostile and adverse to each other (a).

Acceptance of rent by the landlord creates the relationship of landlord and tenant between the parties, and until that relationship is legally determined, the landlord cannot dispossess the tenant (b). **Chaitan Singh v. Sadhari Monim**, 5 C.L.J. 62.

HARINGTON and MOOKERJEE, JJ.

References:—(a) 12 C. 484, F. (b) 4 App. Cas. 324, *relied upon*.

- (4) *Limitation Act, Sch II, Art. 144—Limitation—Lease—Possession derived from a lessee not necessarily adverse as against the lessor.*

Held that possession acquired during the continuance of a lease will not ordinarily be adverse possession as against the lessor, until at any rate, such time as the lessor, becomes

Adverse possession.—(Concluded).

entitled to possession. **Thamman Pande v. The Maharaja of Vizianagram**, A.W.N. (1907), 185 = 4 A.L.J. 726 = 29 A. 598.

AIKMAN and GRIFFIN, JJ.

References:—27 A. 395, 13 C. 101, 10 W.R. 15, 9 C. 367, 10 C. 577, 23 C. 863, F. 4 C. 327, R. 14 W.R. 395, 17 W.R. 377, 9 C.L.R. 347, 26 C. 460, *not F.*

- (5) *Mahomedan co-owners—One of them out of possession for twelve years—Co-owner in possession not recognising his title, effect of—Distinction from Hindu co-ownership—See Co-OWNERS*, No. 1, 4 A.L.J. 473.

- (6) *Possession by widow of pre-deceased son—Whether adverse—See CUSTOMS (PUNJAB)*, No. 35, 102 P.R. 1907.

- (7) *Acquisition of limited interest by—See LIMITATION*, No. 5, 17 M.L.J. 469.

- (8) *Plea of, first taken in Court of appeal, whether allowable—See ESTOPPEL*, No. 2, 6 C.L.J. 621.

- (9) *Mortgagee's possession not adverse to true owners—See MORTGAGE (REDEMPTION)*, No. 19, 4 A.L.J. 787.

Advocate.

- (1) *Capacity of Advocate to sue or be sued for professional services—Bar-at-Law.*

A Barrister, as a barrister, has no right to practice in India. He asks for permission to practise as an Advocate. He, on admission, subjects himself to a disciplinary authority, to which he is not subject as a barrister. He is liable as other Advocates of the Court to which he is subject are liable to; and he acquires the same rights as other Advocates have. His professional status in India is that of an Advocate, and the Law applicable to him is the Law of, and custom in, India, applicable to an Advocate of the Court in which he practices. Hence he can sue for his fees for professional services rendered, and can be sued for negligence (a). **Pennell v. Harrison**, 4 L.B.R. 55 (F.B.).

FOX, C.J., and BIGGE, IRWIN and HARTNOLL, JJ.

References:—(a) 25 W.R. 832, F. 9 A.C. 745; 25 A. 509; (1863) 13 C.P.N.S. 677, R.; (1895) P.R. 219, Diss. •

- (2) *Unprofessional conduct—Solicitor, acceptance of case without intervention of.*

An Advocate, who makes an arrangement with his client, without the intervention of any solicitor, to do work at a fee of half of

Advocate.—(Concluded).

that which is the usual charge, is guilty of unprofessional conduct.

*Where an Advocate, who has settled a point in a case, wrote to his client that he would take the case against her, unless he was paid five times the ordinary fee, he is guilty of unprofessional conduct. *In the matter of S.K. H., an Advocate*, 6 C.L.J. 55 (F.B.) = 6 Cr.L.J. 16 = 34 C. 729.

MACLEAN, C.J., and RAMPINI, HARRINGTON, MITRA and CHITTY, JJ.

(3) Powers of enrolment of Advocates—Disciplinary authority of High Court—Counsel guilty of contempt—Suspension without trial—See *LETTERS PATENT* (N.W.P.), No. 1, A.L.J. 34 = 9 Bom. L.R. 9.

Agency.

Elements necessary to constitute—Whether mere giving advice in matters of business constitutes agency—See *PLEADER and CLIENT*, No. 1, 12 C. W. N. 28.

Agent.

(1) *Suit for money advanced to agent for benefit of principal—Principal and Agent—Agent, authority of—Agent, act of, beyond authority—Agent, necessary acts of, if binding on principal—Civ. Pro. Code, S. 257-A—Authority to have a sale postponed, extent of—Indian Contract Act (IX of 1872), S. 188—Powers of attorney, construction of—Interest on loan.*

Where A does an act as agent for B without any communication with C, C cannot, by afterwards adopting that act, make A his agent and thereby incur any liability or take any benefit under the act of A (a).

Under S. 257 A of the Civ. Pro. Code, every agreement to give time for the satisfaction of a judgment-debt is void, unless it is made for consideration and with the sanction of the Court which passed the decree, and such Court deems the consideration to be, under the circumstances, reasonable.

Powers of attorney are to be construed strictly, that is to say, where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that, on a fair consideration of the whole instrument, the authority in question is to be found within the four corners of the instrument either in express terms, or by necessary implication (b).

Agent.—(Concluded).

An agent, authorised to obtain an extension of time and postponement of an intending judicial sale, has, within the meaning of S. 188 of the Indian Contract Act (IX of 1872), authority to do every lawful thing, which is necessary in order to do the act which he is expressly authorised to do.

If the implied authority of an agent to raise a loan is not established, but it is proved that the sum borrowed or a portion thereof has been applied for the benefit of the principal with his knowledge, the creditor is entitled to be reimbursed by the principal to the extent he has been benefited (c).

Although an unqualified admission of a debt implies a promise to pay, yet if there is a covenant and an agreement to pay, which is not absolute but qualified in its terms, for instance, if there is a covenant to receive payment out of a specified fund, it does not create the relation of creditor and debtor as upon a simple loan of money (d).

Whether there is such a covenant must depend upon the construction of the instrument in each case and the intention of the parties as evidenced by the circumstances (e).

An implied authority to agree to the payment of a particular rate of interest must be made out in the same manner as an implied authority to raise a loan (f). *Ghasiram v. Raja Mohan Bikram Sha*, 6 C.L.J. 639.

BRETT and MOOKERJEE, JJ.

References:—(a) (1843) 6 M. and G. 236 = 64 R. R. 770, (1901) A.C. 240, R; (b) (1893) A.C. 170, R; (c) 1 C.L.J. 199, 1 K.B. 108, R; (d) 4 C.L.J. 246, 4 C.L.J. 510, R; (e) 4 Q.B. 182 = 62 R.R. 316, R; (f) 1 C.L.J. 199, R.

Agreement.

(1)—to provide funds for litigation—Specific performance—Limitation—See *LITIGATION*, No. 1, 10 O.C. 173.

Alienation of Land Act.

See ACT XIII OF 1900 (PUNJAB ALIENATION OF LAND).

Alternative claims.

(1) *Inconsistent claims—Ownership—Easement.*

A suit is not liable to be dismissed because the plaintiff claims in the alternative, over the same plot of ground, rights of ownership and easement. *Narendra Nath Barari v. Abbaya*

Alternative claims.—(Concluded).

Charan Chattopadhyaya, 4 C.L.J. 437 = 11 C.W.N. 20 = 1 M.L.T. 364 = 34 C. 51 (F.B.).

MACLEAN, C.J., and GHOSE, GEIDT, MOOKERJEE and HOLMWOD, JJ.

Reference:—4 C.L.J. 367, *Appr.*

(2)—of gift and inheritance, validity of—See **HINDU LAW (INHERITANCE)**, No. 2, 17 M.L.J. 285.

Alyasantana.

(1) Right of junior members of, family to show that a judgment-debtor did not represent the family, when the debt was incurred—See **RES JUDICATA**, No. 18, 17 M.L.J. 260.

Amendment.

(1) *Application for, by non-appealing party—Decree confirmed on appeal—Jurisdiction of first Court—Civ. Pro. Code, S. 206.*

The Court of first instance has no jurisdiction to amend a decree under S. 206 of the Civ. Pro. Code on the application of a non-appealing defendant, when the decree has been confirmed on an appeal by the other defendants. **Sri Gobind Sing v. Gangatri Pershad Singh**, 6 C.L.J. 542.

BRETT and MOOKERJEE, JJ.

References:—24 C. 759, 11 A. 267 (F.B.), 18 B. 542, 18 M. 214 (F.B.), *Il.*

Appeal.

1—GENERAL.

2—SECOND APPEAL.

3—PRIVY COUNCIL.

—1. General.

(1) *Decree in terms of an award—Judicial officer deciding a case as an arbitrator—Government Order, No. 222 A. of 1862, prohibiting such an officer from accepting the office of an arbitrator—Proceeding not rendered abortive.*

If a presiding Judge is appointed an arbitrator in his personal capacity, the parties cannot impeach whatever award may be made by him, on the ground that he was the presiding Judge (a).

In a suit brought in the Court of the Subordinate Judge of Benares, before any of the matters in issue were decided, the parties appointed the Subordinate Judge as the sole arbitrator and the office was accepted in ignorance of the G.O. No. 222 A, dated September, 1862, prohibiting all Government servants from

Appeal.—(Continued).**—1. General.—(Continued).**

accepting the office of arbitrators. The Subordinate Judge decided the case as arbitrator, and passed a decree in terms of the award. *Held*, in view of the Government Order, he ought not to have entertained the arbitration. *Held also*, that the arbitration proceedings were not rendered abortive, by reason of the Government Order, and no appeal lay from the decree passed in terms of the award. **Parbati Kuar v. Baikuntha Nath**, 4 A.L.J. 89 = A.W.N. (1907), 35.

STANLEY, C.J., and BURKITT, J.

Reference:—(a) *In re Durham, etc., ex parte Wilson*, L.R. 7 C.H. 45, *R. and F.*

(2) *Bengal, N.W.P. and Assam Civil Courts Act (XII of 1887), S. 21—Appeal—Forum—Value of suit—Acceptance of lesser sum by consent decree.*

When the original value of a suit was over Rs. 5,000, and, by a consent decree, the plaintiff accepted a sum of less than Rs. 5,000; an appeal against an order passed in execution of such decree by the Subordinate Judge lies to the High Court, and not to the District Judge.

Quære:—Whether, when such appeal is presented to the District Judge, he should return the memorandum of appeal to the appellant, for presentation before the High Court, or he is justified in dismissing the appeal. **Jogendra Nath Roy v. Saraswati Debi**, 6 C.L.J. 38.

RAMPINI and SHARFUDDIN, JJ.

(3) *Civil Procedure Code, Ss. 2, 13, 97, 98, 102, 103, 136, 204, 336, 373, 381, 540, 556, 558 and 588 (S. 45 of Act VII of 1888—Order dismissing a suit in default not a decree and not appealable—Dismissal of a part of suit—Plaintiff's application to withdraw under S. 373, C.P.C., from the remaining part of the suit and to prepare decree for the part dismissed—Court refusing to grant the application and insisting to give finding on all the issues under S. 204, C.P.C.—Plaintiff's failing to appear subsequently—Dismissal of whole suit in default—No material irregularity or acting in excess of or without jurisdiction—Appeal not treated as revision.*

K brought a suit against N for recovery of a total sum of Rs. 98,082-8-8, but his suit comprised two entirely separate claims. In the first place he claimed to recover a sum of Rs. 88,082-8-8 with interest, as being the amount,

Appeal.—(Continued).**—1. General.—(Continued).**

which he was wrongfully compelled to pay, upon a decree obtained against D.

In the second place, he claimed Rs. 10,000, as damages for alleged acts committed by N, in realizing the first-mentioned sum from him. On 18th November, 1902, the District Judge dismissed the first part of the claim, and ordered to proceed with the second part.

On 3rd December, 1902, K applied to the District Judge, to prepare a decree sheet, in respect of the part of the claim dismissed. The District Judge explained that his order of 18th November, 1902, was merely, that he had *pro tanto* disallowed the claim, and that the decree would be based on the final order in the case. K's application for review of the order of 18th November, 1902, was also rejected on 21st March, 1903, and various other issues were framed.

K subsequently called various witnesses, whose evidence was taken on the 16th and 17th April, 1903, and, on the latter date, certain evidence was also taken on behalf of N.

On 25th May, 1903, K applied to the District Judge, that he may be permitted to withdraw under S. 373, C. P. C., the second part of the claim, and that decree may be prepared for first part dismissed.

The learned District Judge rejected this application also and held, that it was advisable to give finding on all the issues under S. 204, C.P.C., and allowed N to produce his evidence thereon.

K objected to this order of the District Judge, and thereafter refused to appear in the case, though the District Judge pointed out to K, that the effect of his refusal to appear would be, that the suit as a whole would have to be dismissed for default. K however failed to appear, with the result that the suit was dismissed for default on 26th May, 1903. K then appealed to the Chief Court. At the hearing, counsel for the respondent urged, that no appeal lay, and questioned the soundness of the F.B. Ruling No. P.R. 60 of 1897.

The learned Judges composing the Division Bench referred the question of appeal from an order under S. 102, C.P.C., again to another Full Bench.

Held, by a majority of 3 (Robertson, Johnstone and Rattigan) Judges of the Full Bench of 5, that an order of a Court dismissing a suit in default under S. 102, C.P.C., is not a decree

Appeal.—(Continued).**-1. General.—(Continued).**

as defined in S. 2 of the Code, and consequently is not appealable (a).

On receiving back the case from the Full Bench, the Division Bench declined to treat the appeal as an application for revision of the order of dismissing the case in default, *holding*, that under the circumstances of the case (briefly noted above), there was no ground for revision, as the District Judge neither acted with material irregularity, nor in excess of, or without jurisdiction, in the procedure adopted by him (b). **Kanhya Lal v. The National Bank of India**, 51 P.W.R. 1907 = 121 P.R. 1907 (F.B.).

REID, CHATTERJI, ROBERTSON, JOHNSTONE and RATTIGAN, JJ.

References :—(a) 60 P.R. 1907 (F.B.), *overruled*. (b) 4 M. 134, 5 W.R. 63 (P.C.) and 17 A. 195, F. 10 C. 1005 and 11 C. 544, *Diss.*

(4) *Arbitration—Award—Civ. Pro. Code (Act XIV of 1882), Ss. 520, 521, 522, 523, 524, 525 and 540—Revision—Distinction between Ss. 526 and 523, C.P.C., as regards appeal.*

An award was made by a private arbitration, appointed out of Court, in favour of N and S against S.M. and D, and in favour of D against S. M. Then N, S, and D applied under S. 525, C.P.C., to have the award filed in Court. S. M. raised certain objections which were disallowed by the District Judge who ordered "the award to be filed and decree passed in accordance with the terms thereof."

S. M. appealed. At the hearing of the appeal two preliminary questions were raised :—

1. Whether an appeal lies against an order under S. 526, C. P. C. directing an award to be filed.

2. If not, whether such an order is open to revision on the grounds urged in the appeal.

Held, by the Full Bench, unanimously, that an appeal does not lie from an order under S. 526, C.P.C., directing an award to be filed, nor from the decree passed in terms of the award, as there is only one decree in the case, *viz.*, the filing of the award and the consequences of the decree being passed in terms of the award, flow from that order and no fresh order is required for those consequences to result but it is not so in proceedings under S. 523, C.P.C.

Held also, that no revision lies in such like cases on the grounds on which no appeal is allowed (a).

Appeal.—(Continued).**—1. General.—(Continued).**

Held, by the Division Bench, that in the appeal no ground for interference on revision is shown. **Shankar Mal v. Nathu Mal**, 58 P.W.R. 1907 (F.B.).

CLARK, C.J., KENSINGTON and JOHNSTONE, JJ.

References:—(a) 84 P.R. 1901 *overruled* by 25 P. R. 1903 (P.C.), 25 P.R. (1888) (P.C.), 89 P.R. 1902 (P.C.); 10 C.W.N. 601 and 11 C.L.J. 153, *followed*. 33 C. 757; 27 A. 526; 29 M. 303, *Diss.*

(5)—*against remand, when to be presented—Erroneous order carried out—Subsequent proceedings, whether void—Waiver—Final disposal of suit, date of—Validity of remand order when to be challenged—Civil Procedure Code (Act XIV of 1882), Ss. 562 and 564—Alternative but not co-existent remedy.*

Per Stephen, J.—An appeal against a remand order, presented before the suit is finally disposed of under that order, that is, before the final decree in the suit has been passed, is good; but a party cannot wait till the final disposal of the suit and then appeal against the interlocutory order without appealing from the decree in the suit.

Proceedings subsequent to an illegal order of remand might be valid under certain circumstances (a).

Per Mookerjee, J.—Although when a Court of first appeal, purporting to act under S. 562 of the Civil Procedure Code, remands a case to the Court of first instance which had not decided the suit merely on a preliminary point, the order is erroneous, yet if the order of remand has been carried out, subsequent proceedings are not void merely because of such error, and will be set aside only if it is established that the erroneous remand order has affected the merits of the case. The error does not affect the jurisdiction of the Court, and consequently may be cured by consent.

The provisions in Ss. 562 and 564 of the Civil Procedure Code were introduced for the benefit of litigants, so as to guard against a fresh trial of the whole cause in the Court of first instance and to protect them from the delay, trouble and expense of a fresh appeal; if, therefore, litigants find it the more advantageous course that the whole case should be re-tried and consent to such a procedure, an order of

Appeal.—(Continued).**—1. General.—(Continued).**

remand contrary to the provisions of S. 564 of the Civil Procedure Code is not null and void. A party who has consented to such an order, is not entitled to treat it as void and incapable of being validated by consent or waiver (b).

Under some circumstances, the final disposal of the suit may be taken to be the delivery of the judgment.

When a litigant has the right to choose between two remedies which are not co-existent but alternative, he may select and adopt one as better adapted than the other, to work out his purpose; but once he has made his choice, and adopted one of the alternative remedies, his act at once operates as a bar as regards the other, and the bar is final and absolute.

Where an order of remand has been made, its validity may be challenged directly and immediately by an appeal under S. 588, cl. (28), or indirectly under S. 591, when an appeal is preferred against the final decree in the suit. The party affected by the order of remand should make his election. He may, if he chooses, prefer an appeal against the order of remand, and obtain a stay of proceedings during the pendency of the appeal; he may, on the other hand, carry out the order of remand, take the chance of a successful termination of the suit in his favour, and, in the event of defeat, prefer an appeal against the final decree in which the validity of the order of remand may be questioned. He cannot, however, if he has carried out the order of remand and taken the full benefit of it, turn round and prefer an appeal against the order of remand (c). **Bainkunta Nath Dey v. Nawab Salimulla Bahadur**, 6 C.L.J. 547.

STEPHEN and MOOKERJEE, JJ.

References:—(a) 28 C 324=5 C.W.N. 509; 5 C.L.J. 71. R. (b) 28 M. 437=15 M.L.J. 236, R. (c) 5 C.L.J. 580, *Cons.*

(6) *Appeal from decisions, when substantial justice has been meted out—Duty of Court to discourage appeals about trifles.*

Parties should accept a decision by a Court, unless there is some substantial grievance. Appeals about trifles, when there has been substantial justice done, should be discouraged. The Chief Court declined to interfere with the rate of interest awarded by the lower Court in

Appeal.—(Continued).

—1. General.—(Continued.)

the exercise of its discretion. **Ram Lal v. Shahmad Khan**, 129 P.R. 1907.

CLARK, C.J.

(7)—*Appeal heard before the hour fixed for hearing cases—Court refusing to hear pleader on his appearance—Material irregularity.*

Held, that where an appellate Court disposes of an appeal, before the hour fixed for hearing cases, and refuses to hear Appellant's Counsel, on his appearing in time, it acts with material irregularity and its order is liable to be set aside on revision. **Chand v. Devi Ditta**, 14 P.W.R. 1907.

ROBERTSON, J.

(8) Suit for ejectment—Defence that defendant is a proprietor—Appeal presented to wrong Court—Limitation Act, S. 5—See ACT II OF 1901 (AGRA TENANCY), No. 11, 4 A.L.J. 1.

(9) Restitution of property sold in execution of a decree reversed in—Procedure—See CIV. PRO. CODE (ACT XIV OF 1882), No. 193, A.W.N. (1906), 315 = 4 A.L.J. 12.

(10) Dispute between judgment-debtors—Application for possession—Question as to with whose money the property was purchased—Appeal against order in execution—See CIV. PRO. CODE, No. 137, 4 A.L.J. 47.

(11) Right of—Against decision of a Revenue Court on a question of title—See ACT II OF 1901 (N.W.P. TENANCY), No. 18, 4 A.L.J. 53.

(12) Order under S. 310A, Civ. Pro. Code, refusing to accept a deposit, an—lies from—See CIV. PRO. CODE, No. 171, 4 A.L.J. 135.

(13)—from an order under S. 310 A, Civ. Pro. Code—Case falling under S. 244 (c), Civ. Pro. Code—See CIV. PRO. CODE, No. 175, 9 Bom. L.R. 15.

(14)—from Court's orders regarding winding up of a company—Position of liquidators—Delegation of powers by liquidators, validity of—See ACT VI OF 1882 (COMPANIES), No. 3, 16 M.L.J. 537 = 30 M. 22.

(15) Delay in appealing against execution-proceedings—Discretion of Court—interference in appeal—See LIMITATION ACT, No. 8, 8 Bom. L.R. 858 = 31 B. 33.

(16) Auction purchaser, a third person—Order under S. 310 A—No appeal—See CIV. PRO. CODE, No. 133, 5 C.L.J. 204.

Appeal.—(Continued).

—1. General.—(Continued).

(17) Private award, decree made on—No appeal—See CIV. PRO. CODE, No. 259, 11 C.W.N. 220.

(18) Application by executor under the will of a Hindu lady governed by the Dayabhaga School—Objection by her son and judgment-debtors—Order in execution—Right of—See CIV. PRO. CODE, No. 106, 11 C.W.N. 239.

(19) Adjournment, application by a pleader for, no appearance in—Application for re-admission, whether allowable—See CIV. PRO. CODE, No. 272, 11 C.W.N. 329.

(20) Dismissal of, rightly, though on wrong grounds—High Court's power of revision—See CIV. PRO. CODE, No. 14, 16 M.L.J. 526 = 2 M.L.T. 40.

(21) Withdrawal of, in cases of, when limitation begins to run for execution of original decree—See EXECUTION OF DECREE, No. 3, 1 M.L.T. 233 = 16 M.L.J. 393 = 30 M. 1.

(22) Objection to validity of submission to arbitration disallowed—Appeal—See CIV. PRO. CODE, No. 249, U. B. R. (1906), Civil Procedure, 52.

(23) Decree in favour of pre-emptor—Payment of purchase-money into Court—Withdrawal of such money by vendee, effect of—Vendee's right of appeal—See PRE-EMPTION, No. 9, 16 P. R. 1907.

(24) Application of judgment-debtor for re-sale after confirmation of sale—Dismissal of application for default—Dismissal of further application for review—Right of appeal—See CIV. PRO. CODE, No. 179, 25 P. R. 1907.

(25) No—From an order made on an application for appointment of a Commissioner—See CIV. PRO. CODE, No. 10, 17 M.L.J. 141.

(26) Requirements of judgment in—See CIV. PRO. CODE, No. 271, 5 C.L.J. 348.

(27) No third—lies to the High Court from the decree in second appeal of a District Judge in a rent suit—See ACT II OF 1901 (N.W.P. TENANCY), No. 13, 3 A.L.J. 688 = 29 A. 69.

(28)—triable by a higher Court decided by lower Court—Revision—Chief Court of the Punjab—See ACT XVIII OF 1884 (PUNJAB), No. 5, 16 P.L.R. 1907.

(29) Decree on judgment in accordance with award—See CIV. PRO. CODE, Nos. 252 and 253, A.W.N. (1907), 115 and 117.

Appeal.—(Continued).**—1. General.—(Continued).**

(30) Finding of first Court on evidence not to be disturbed on, except on ground of omission to appreciate some evidence—See *EVIDENCE*, No. 8, 9 Bom. L. R. 393.

(31) Return of plaint to be presented to proper Court—Appeal from order of return—See *CIV. PRO. CODE*, No. 81, 5 C. L. J. 580 = 11 C. W. N. 765.

(32) Transfer of district from one Province to another—Jurisdiction to hear appeal—See *JURISDICTION (GENERAL)*, No. 5, 5 C. L. J. 550.

(33) Time granted by first Court for redemption—Effect of unsuccessful appeal on calculation of time—See *MORTGAGE (REDEMPTION)*, No. 8, 11 C. W. N. 679.

(34) Under S. 39 (a) of the Punjab Courts Act from unclassified suits of over Rs. 100 in value lies to Divisional Court, not to District Judge—See *ACT IX OF 1887 (PROVINCIAL S. C. COURTS)*, No. 7 (a), 134 P. R. 1906 = 18 P. L. R. 1907.

(35) Decree in favour of plaintiff for portion of his claim—Execution of such decree—Whether he can prosecute appeal as regards portion of claim dismissed—See *EXECUTION OF DECREE*, No. 7, 31 P. R. 1907.

(36)—against order allowing guardian to spend ward's property after termination of guardianship—See *GUARDIAN and MINOR*, No. 5, 17 M. L. J. 199.

(37) Collector's order setting aside his previous order for issue of warrant for ejecting tenant—Appeal against—See *ACT VIII OF 1865 (RENT RECOVERY, MADRAS)*, No. 14, 2 M. L. T. 106 (F. B.).

(38) Rival decree-holders, order distributing surplus proceeds of a *putni* sale amongst—Attaching creditor is not representative of judgment-debtor—No appeal by attaching creditor—See *CIV. PRO. CODE*, No. 131, 11 C. W. N. 433.

(39)—preferred to wrong Court—Due diligence—Negligence—Extension of time—See *LIMITATION ACT*, No. 9, 34 C. 216 = 5 C. L. J. 320.

(40)—against order refusing to issue commission for examining witnesses—See *LETTERS PATENT, MADRAS*, No. 2, 30 M. 143.

(41) Order granting leave to bring suit for accounts of religious endowment—Not a decree—No appeal—See *ACT XX OF 1863 (RELIGIOUS ENDOWMENTS)*, No. 3, 5 C. L. J. 641.

Appeal.—(Continued).**—1. General.—(Continued).**

(42)—upon a question of costs—See *PARTITION*, No. 4, 5 C. L. J. 642.

(43) Appellate Court not deciding matter appealed, effect of—See *MORTGAGE (GENERAL)*, No. 19, 5 C. L. J. 653.

(44) Application for, on the ground of discovery of new evidence—Rejection by Court—Application for admission of some evidence in appeal—Jurisdiction of Appellate Court to take further evidence—Local investigation by Appellate Court—See *CIV. PRO. CODE*, No. 289, 11 C. W. N. 721.

(45) Sale under first mortgage—Surplus sale-proceeds—Second mortgagee's rights—Appeal against order awarding surplus proceeds—Appeal treated as revision—See *MORTGAGE (GENERAL)*, No. 21, 4 A. L. J. 492.

(46)—from order of remand in Small Cause suits—See *LIMITATION ACT*, No. 64, 11 C. W. N. 862.

(47)—against order refusing to restore application under S. 310, *CIV. PRO. CODE*—See *CIV. PRO. CODE*, No. 66, A. W. N. (1907), 186.

(48)—against Court's order striking out co-defendant's name—See *CIV. PRO. CODE*, No. 41, 71 P. R. 1907.

(49) Application under S. 310 (A) by transferee from judgment-debtor—Appeal from order rejecting application—See *CIV. PRO. CODE*, No. 134, 17 M. L. J. 291.

(50) Right of, from order declaring a person not to be the legal representative—See *CIV. PRO. CODE*, No. 205, 10 O. C. 121.

(51)—in suit asking for assessment of revenue on a certain area of land—See *ACT II OF 1901 (AGRA TENANCY)*, No. 7, A. W. N. (1907), 225.

(52)—in suits of small cause nature—See *LANDLORD and TENANT*, No. 3, 6 C. L. J. 218.

(53)—against order rejecting or admitting plaint—See *CIV. PRO. CODE*, No. 283, 6 C. L. J. 214.

(54) Two appeals from one decree—Decrees in, drawn up in identical terms, effect of—See *PRINCIPAL AND AGENT*, No. 2, 4 A. L. J. 587 = A. W. N. (1907), 245.

(55) Order of remand—Whether appeal lies after final disposal of suit—See *CIV. PRO. CODE*, No. 285, 4 A. L. J. 569.

(56)—from order dismissing for default application to set aside sale—See *CIV. PRO. CODE*, No. 180, 10 O. C. 171.

Appeal.—(Continued).**-1. General.—(Continued).**

(57)—by one of the defendants against whom decree passed—Plaintiff not appealing—Appellant found not liable—Relief against other defendants, grant of—See CIV. PRO. CODE, No. 278, 3 N.L.R. 85.

(58) Suit relating to charity—Suit by Advocate-General at instance of relators—Dismissal of suit—Right of appeal—See CIV. PRO. CODE, No. 264, 9 Bom. L.R. 996.

(59) Valuation of, where plaintiff claims amount approximately in plaint—Claim to mesne profits—See VALUATION OF SUIT, No. 1, 6 C.L.J. 255.

(60) Order appealed from purporting to decide questions to be dealt with under S. 244, Civ. Pro. Code—Appellability—See CIV. PRO. CODE, No. 100, 2 M.L.T. 307.

(61)—filed on one of three copies of same judgment—Limitation—See LIMITATION ACT, No. 10, 10 O.C. 201.

(62)—against the decision of the Assistant Collector on a question of proprietary title—See, JURISDICTION (CIVIL AND REVENUE COURTS), No. 1, 4 A.L.J. 686.

(63) Appeal presented in wrong Court—Client acting on counsel's advice—Whether sufficient cause for not preventing appeal in time—See LIMITATION ACT, No. 7, 10 O.C. 291.

(64) Original decree prescribing a condition—Appellate decree merely confirming original decree—Time for performance of condition—Duty of Appellate Court—See DECREE, No. 1, 17 M.L.J. 495.

(65)—dismissed for default at 11-30 A.M.—Judge leaving Court at 12-30 P.M.—Sufficient cause for re-admission of appeal—See CIV. PRO. CODE, No. 273, 69 P.W.R. 1907.

(66)—filed out of time—*Bona fide* mistake of pleader in calculation—Sufficient cause for admission—See LIMITATION ACT, No. 13, 12 C.W. N. 25.

(67) Abuse of Court's process—Wrong done by order of Court—Court's inherent power to rectify—Events happening after filing appeal. See COURT, No. 1, 6 C.L.J. 662.

(68) Application by assignee of the decree holder purchaser for order under S. 818, C.P.C.—Objection by judgment-debtor—Right of appeal—See CIV. PRO. CODE, No. 138, 6 C.L.J. 749.

(69)—Agreement to remand the case for trial of fresh issues on points not raised in the grounds

Appeal.—(Continued).**—1. General.—(Concluded).**

of appeal—See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), No. 8, 17 M. L.J. 518.

—2. (Second Appeal).

(1) Sambalpur district—Divisional Judge, appellate decision of—Second appeal whether lies to the Calcutta High Court—Bengal and Assam Laws Act (VII of 1905), Sch. D—Act II of 1904 before repeal by Act IV of 1906—Civil Procedure Code (Act XIV of 1882), S. 584—Gift—Registration without delivery of possession—Validity—Transfer of Property Act (IV of 1882), S. 123—Erroneous interpretation of law by Central Province Courts, if binds parties of Calcutta High Court—Gift by Hindu female heiress—Suit by reversioner to have deed declared void—Cause of action—Specific Relief Act (I of 1877), S. 39.

The District of Sambalpur was part of the Central Provinces until 16th October, 1905, when it was added to the Province of Bengal by proclamation.

Held that, under Act VII of 1905, an appeal preferred on the 21st December, 1905, against an appellate decision of the Divisional Judge of Sambalpur of 22nd August, 1905, lay to the Calcutta High Court, and not to the Judicial Commissioner of the Central Provinces.

A second appeal, though not expressly provided for by Act II of 1904 (which was in force at the time this appeal was preferred), lay under S. 584 of the Civil Procedure Code, the Court of the Divisional Judge being a Court subordinate to the Calcutta High Court, since Act VII of 1905 came into operation.

Under S. 123 of the Transfer of Property Act, a deed of gift, if registered, is valid, whether accompanied by delivery of possession or not.

The fact that the Courts of the Central Provinces were erroneously of opinion that delivery of possession was necessary to give validity to the deed would not render the deed inoperative.

When such a deed is executed by a Hindu female heiress, a cloud is thrown on the rights of reversioners, so as to give them a cause of action under S. 39, Specific Relief Act, to have the deed declared null and void as against them *Balbhadra v. Musst. Bhawani*, 11 C.W.N. 956 = 6 C.L.J. 233 = 34 C. 653.

RAMPINI and SHARFUDDIN, JJ.

Appeal.—(Continued).**—2. Second Appeal.—(Continued).**

(2) A finding of fact cannot be interfered with in second appeal, however erroneous, if there be some evidence in support of the finding. **Dwarka Nath Bakshi v. Mukundu Lal Chowdhury**, 5 C.L.J. 55.

RAMPINI and GEIDT, JJ.

Reference :—18 C. 23, R.

(3) Evidence, disregard of—Finding of fact—See CIV. PRO. CODE, No. 29, 11 C.W.N. 380.

(4) Sufficiency of accommodation for residence of Hindu widow—Question of fact—See HINDU LAW (WIDOW), No. 3, 9 Bom. L.R. 382.

(5) Finding of fact—Petition for mutation reciting a gift—Evidence of gift disbelieved—Petition for mutation not amounting to a gift—Question not a question of construction—See CIV. PRO. CODE, No. 51, 4 A.L.J. 121.

(6) Whether a sale by a guardian was for benefit of minors is a question that can be gone into on—See MAHOMEDAN LAW (ALIENATION), No. 1, 4 C.L.J. 485=11 C.W.N. 71=34 C. 36.

(7) Error of Law—Boundary dispute—Omission of lower Court to admit topographical Survey Map in evidence—See EVIDENCE ACT, No. 9, 11 C.W.N. 230.

(8)—in cases of sanction to prosecute—See SANCTION TO PROSECUTE, No. 5, 17 M.L.J. 266. (F.B).

(9) Appeal against order passed under S. 244, Civ. Pro. Code, in execution of Small Cause Court decree—See SMALL CAUSE COURT, No. 2, 11 C.W.N. 861.

(10) Second appeal where Court of first appeal wrongly excluded evidence—Error of law See ACT VIII OF 1885 (TENANCY, BENGAL), No. 24, 11 C.W.N. 1028.

(11) Power of Court of second appeal to deal with question not specified in memorandum of appeal—Plea of limitation—Second appeal from Sambalpur Court—See LIMITATION ACT, No. 6, 11 C.W.N. 959.

(12) Test for determining whether second appeal lies—Suit of small cause nature—See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), No. 9, 30 M. 212.

(13) Second appeal against order setting aside order granting review—See CIV. PRO. CODE, No. 309, 6 C.L.J. 225.

(14) Whether question of law can for the first time be allowed to be raised in second

Appeal.—(Concluded).**—2. Second Appeal.—(Concluded).**

appeal—See ACT VI OF 1876 (ENCUMBERED ESTATES, CHOTA NAGPUR), No. 1, 11 C.W.N. 1127.

(15) Death of respondent—Application by appellant for substitution of heirs—Civ. Pro. Code, Ss. 582 and 587—See LIMITATION ACT, No. 121, 11 C.W.N. 1100.

—3.—(Privy Council).

(1) *Several suits dealt with in the same judgment—Aggregate value exceeds Rs. 10,000—S. 596, Civ. Pro. Code.*

Where, although, if each case be taken separately, the value is below Rs. 10,000, yet, it taken collectively, the aggregate reaches that amount, and the cases are all dependent upon the same judgment, the case falls within S. 596 of the Code, and leave to appeal to Privy Council should be granted in each of the cases. **Deo Narain Singh v. Guni Singh**, 34 C. 400.

MACLEAN, C.J. and HOLMWOOD, J.

References :—4 C.L.R. 125, 8 C. 210. 11 C. 407, R.

(2) Reference to Civil Court of question of apportionment of compensation money—Decree of High Court affirming decision—Appeal to Privy Council—Appealable value—Amount indirectly involved—See ACT I OF 1894 (LAND ACQUISITION), No. 1, 11 C.W.N. 525.

(3) No—when the lower Courts differ only as to costs—See CIV. PRO. CODE, No. 299, 10 O.C. 65.

(4)—against Punjab Chief Court's order of remand—Such order not a final decree—See CIV. PRO. CODE, No. 286, 52 P. R. 1907.

(5) On question of waiver—Question of fact—See WAIVER, No. 4, 11 C.W.N. 799 (P.C.).

(6) Appeal against High Court's order refusing to admit appeal presented beyond prescribed period—See CIV. PRO. CODE, No. 298, 9 Bom. L. R. 566.

(7) Appeal by special leave—Practice of Calcutta High Court—Time for depositing estimated costs—High Court's power to extend time—See CIV. PRO. CODE, No. 302, 11 C.W.N. 1104.

(8) Application for leave to, dismissed with costs—Order as to costs how to be enforced—See COSTS, No. 1, 11 C.W.N. 856.

(9)—from order of remand—See CIV. PRO. CODE, No. 301, A.W.N. (1907), 291.

Appearance.

(1) Application for adjournment by pleader, whether an—See CIV. PRO. CODE, No. 272, 11 C.W.N. 329.

Appellate Court.

(1) *Power of, to take notice of facts transpiring during pendency of appeal—Discretion—Mortgages executed on the same day—Priority—Joint tenancy or tenancy in common when neither proved to have been executed before the other.*

As a general rule, a Court of Appeal, in considering the correctness of the judgment of the Court below, will confine itself to the state of the case at the time such judgment was rendered, and will not take notice of any facts, which may have arisen subsequently. But the Court will, in exceptional cases, depart from this rule, specially where, by so doing, it can shorten litigation and best attain the ends of justice.

Plaintiff was given leave to amend his plaint, so as to adapt his case and prayers for relief to the new facts, the amendment not altering the nature of the case.

When two mortgages are executed on the same day, that which was executed first takes priority, and evidence may be given to ascertain which was in fact executed first. Where this cannot be ascertained, the mortgagees would take as joint tenants or tenants in common (a), **Ram Ratan Sahu v. Bishun Chand**, 11 C.W.N. 732 = 6 C.L.J. 74.

MOOKERJEE and HOLMWOOD, JJ.

Reference :—(a) 3 Deg. J. and S. 116, followed.

(2) *Event happening after the passing of order—Appellate Court, duty of—Decree-holder, purchaser—Ex parte decree, setting aside—Sale, reversal—Order setting aside ex parte decree, reversed.*

A Court of appeal is not only competent, but may, under certain circumstances, be bound to take cognizance of an event, which has happened since the order, questioned on appeal, was passed by the Subordinate Court.

When the decree-holder is the purchaser in execution of an *ex parte* decree, upon reversal of the decree, the sale falls through. The fact that, before the judgment-debtor applies for reversal of the sale, the plaintiff succeeds in obtaining another decree of similar character against the defendant, does not validate the title based upon the decree which has been reversed. But this does not apply when the order or reversal of the decree is set aside by a

Appellate Court.—(Concluded).

superior Court and the decree is ultimately restored (a). **Hazari Mull v. Janki Prasad**, 6 C.L.J. 92.

BRETT and MOOKERJEE, JJ.

References :—(a) 27 C. 810, *Distgd.* 31 C. 499, R.

(3) *Decision of, whether can be based on suggestion by a pleader as to a matter of fact—See EVIDENCE, No. 2, 11 C.W.N. 130 = 1 M.L.T. 429 = 5 C.L.J. 4 = 9 Bom. L.R. 80 = 17 M.L.J. 32 (P.C.).*

(4) *Power of, to go behind first Court's order setting aside award for judicial misconduct of arbitrator—See CIV. PRO. CODE, No. 251, 66 P.R. 1907.*

(5) *Event happening after the passing of order challenged in appeal—Duty of—See CIV. PRO. CODE, No. 135, 6 C.L.J. 102.*

(6) *Appellate Court's interference with finding of trying Court upon conflicting evidence—See TRANSFER OF PROPERTY ACT, No. 2, 11 C.W.N. 1109.*

(7) *Jurisdiction of, to stay of sale of immoveable property in execution of money-decree—See CIV. PRO. CODE, No. 270, 11 C.W.N. 1030.*

(8) *Power of, to act under S. 158, Civ. Pro. Code—See CIV. PRO. CODE, No. 84, 10 O.C. 245.*

(9) *Document received and acted on by lower Court—Court of appeal to be slow to interfere with lower Court's discretion—See ESTOPPEL, No. 2, 6 C.L.J. 621.*

(10) *Power of, on remand—Power to modify original decree in favour of party not appealing—See CIV. PRO. CODE, No. 277, 34 C. 996.*

Application.

Order striking off an application, and one dismissing it for default, no substantial distinction between—See **MESNE PROFITS**, No. 1, 12 C. W. N. 3.

Arbitration.

(1) *Submission to—Revocation of—Good cause—Collusion of arbitrator.*

A submission to arbitration can be revoked for good cause and not arbitrarily (a). Where the arbitrator is in fraudulent collusion with the defendant, the submission can be revoked. **Bansil Dhar v. Sital Prasad**, 3 A.L.J. 613 = A. W. N. (1906), 253 = 29 A. 13.

BANERJI and RICHARDS, JJ.

Arbitration.—(Continued).

Reference :—(a) 12 M.I.A. 112, F.

(2) *Arbitrator, holding private and secret enquiries—Misconduct.*

An arbitrator making private enquiries is guilty of legal misconduct for which an award is liable to be set aside. **Daya Kishen v. Dharam Das**, 4 A.L.J. 159 = A.W.N. (1907), 75.

EDGE, C.J., and BRODHURST, J.

(3) Agreement to refer to arbitration—Appeal from order of reference—See CIV. PRO. CODE, No. 6, 126 P.R. 1907.

(4) Reference to, out of Court—Application to file award—Decree in terms of award—Suit to set aside decree—See RES JUDICATA, No. 11, 9 Bom. L. R. 259.

(5) Judicial officer deciding a case as arbitrator—Government order prohibiting such officer from accepting the office of an arbitrator—Proceeding not rendered abortive—See APPEAL (GENERAL), No. 1, 4 A.L.J. 89.

(6) Decree in accordance with award—Reference to arbitration by guardian *ad litem* of minor without Court's sanction, validity of—See CIV. PRO. CODE, No. 223, 4 P.R. 1907.

(7) Objection to validity of submission disallowed—Appeal—See CIV. PRO. CODE, No. 249, U.B.R. (1906), Civil Procedure, 52.

(8) Validity of award, when one of the parties do not join submission—See CIV. PRO. CODE, No. 244, 4 A.L.J. 347.

(9) Decree on judgment in accordance with award—Appeal—See CIV. PRO. CODE, Nos. 252 and 253, A.W.N. (1907), 115 and 117.

(10) Counsel of both parties acceding to Appellate Court's suggestion of viewing locality does not constitute the proceeding as—See CIV. PRO. CODE, No. 289, 11 C.W.N. 721.

(11) Judicial misconduct of arbitrator—Receiving evidence from one party in the absence of the other—See CIV. PRO. CODE, No. 251, 66 P.R. 1907.

•(12) Reference to arbitration by Judge on parties' oral application—Judge superseding the reference whether legal arbitrator not having declined to act—See CIV. PRO. CODE, No. 247, 4 A.L.J. 691.

(13) Reference to, not concurred in by all parties—Setting aside award—See CIV. PRO. CODE, No. 245, 11 C.W.N. 1152.

Arbitration.—(Concluded).

(14) Reference to—Invalidity of award—Second reference without consent—Validity of second award—See FOREIGN JUDGMENTS, No. 1, 2 M.L.T. 269 = 30 M. 292.

(15) See AWARD.

Arbitration Act.

See ACT IX OF 1899.

Assessment.

—of damages, principles regulating—See DAMAGES, No. 2, 6 C.L.J. 398.

Assignee.

—of mortgage-decree—Execution of decree—See TRANSFER OF PROPERTY ACT, No. 38, 9 Bom. L.R. 728.

Assignment.

(1) *Validity of, by way of mortgage—Conditional assignment—Assignee's right—Law applicable to the Punjab.*

An assignment of the assignor's interest in a certain sum due from a third party, "until certain advances made by the assignee to the assignor had been paid off with interest," is a conditional assignment. And a charge or a conditional assignment is not such an assignment as gives the assignee all the rights which, under the Judicature Act, he can have, only when the assignment is absolute, *i.e.*, when it absolutely vests the property in him.

So, a person, to whom a non-negotiable promissory-note is assigned by the payee, as security for a debt due from the payee to the assignee, until the debt due to the assignee remains unpaid, cannot, as such an assignment is only conditional, sue the maker of the pro note, in his own name, for recovery of the amount due on the note (a).

Neither the Judicature Act nor the Transfer of Property Act is, in terms, in force in the Punjab, and the Court is at liberty to adopt such provisions of the one or the other, as appear to it to be consonant with the general principles of law and equity. **Nihal Chand v. Ali Bakhsh**, 9 P.R. 1907 = 41 P.W.R. 1907.

RATTIGAN, J.

References :—(a) L.R. 1 Q.B. (1898) 765, F; 12 P.R. 1894, 1 A. 732, R.

(2) —of *Mulgeni* tenure—Assignee's liability arises by transfer to him and not by obtaining possession—Transfer of Property Act, S. 109 (j).

Assignment.—(Concluded).

The liability of the assignee from a lessor arises by reason of his privity of estate, and this privity is created by the transfer to him, and not by his obtaining possession. Similarly, when the assignee in turn assigns over, his privity of estate ceases, and, consequently, his liability also ceases in respect of breaches of covenant committed after he has assigned over. This principle applies both to agricultural and non-agricultural leases, although the Transfer of Property Act does not apply to an agricultural lease. **Saldanha v. Subraya Hebbara**, 17 M.L.J. 258 = 2 M.L.T. 368 = 30 M. 410.

BENSON and WALLIS, JJ.

References:—1 M.H.C. 21, 3 C.L.R. 285, not F. 17 M. 296, R.

(3)—*of debt—Plea of assignment without consideration—Benami transactions—Sham transactions—Fraud.*

An assignee of a debt suing the debtor cannot be defeated by a plea of the latter that the assignment is without consideration. This principle has no application, where the assignment is impeached, not merely on the ground of being *benami*, but on the ground of being a sham transaction, intended to defeat the provisions of an Act, and prejudice the rights of the person so impeaching it. In such a case, the transaction is substantially assailed on the ground of fraud. To cases like these, the rule in *Mulji v. Nathubhai* (a) applies. **Satu Yithuji v. Dagdu Bhagu**, 9 Bom. L.R. 462.

CHANDAVARKAR and PRATT, JJ.

Reference:—(a) 15 B. 1, *Appl.*

(4) Endorsement on Pro-note—Intention to effect a transfer—See PROMISSORY NOTE, No. 1, 1 M.L.T. 329 = 16 M.L.J. 554 = 30 M. 75.

(5) Assignment *pendente lite*—Addition of assignee as co-defendant after period of limitation, effect of—See LIMITATION ACT, No. 38, 3 P.R. 1907.

(6)—*of decree by plaintiff pending suit—Assignee's right to execute decree—See CIV. PRO. CODE, No. 108, 2 M.L.T. 197.*

(7) Act IV of 1900 (Punjab descent of jagirs) S. 8, cl. 3—Sub-assignment—Liability to be attached in execution—See ACT IV OF 1900 (PUNJAB DESCENT OF JAGIRS), No. 1, 117 P.R. 1907.

(8)—*of contract—Benefit of contract can be assigned—See CONTRACT, No. 4, 9 Bom. L.R. 114.*

Attachment.

(1) *Effect of—Rights of attaching creditor—Interference with right—Measure of damages—S. 244, C.P. Code—Applicability to person not party to proceedings—Power of executing Court to commit for contempt—*

Although an attaching creditor does not by attachment acquire priority over other creditors coming in later (a), he acquires a right to have the whole of the attached property applied in satisfaction of his debt, if no other creditors come forward, and in any case, to have a rateable proportion so applied. In this sense, an attaching creditor is said to have a charge on the attached property (b), and he has also the right to prevent the attached property passing by survivorship (c).

A person, who interferes with that right, as by carrying away the crops attached, violates a legal right and commits an actionable wrong (d).

The amount of damages will depend upon the evidence, but cannot exceed the value of the attached property (e).

S. 244 of the C. P. Code does not apply where the person violating the right of an attaching creditor is not a party to the original suit (f).

An attaching Court has no inherent power to commit for contempt (g). **Sankaralinga Reddy v. Kandasawmy Thevan**, 17 M.L.J. 334 = 2 M.L.T. 365 = 30 M. 413.

BENSON and WALLIS, JJ.

References:—(a) 29 C. 428 and 26 M. 673, R. (b) 5 C. 148 (174) and 12 M.L.J. 24 (27), R. (c) 4 M. 302 and 11 C.W.N. 163, R. (d) (1903) 2 K.B. 545, (1901) A. C. 495, R. (e) 15 M. and W. 212 (215), F. (f) 3 I.A. 241, *Distgd.* (g) 26 M. 494, R.

(2)—*of fodder for cattle, validity of—See CIV. PRO. CODE, No. 153, 82 P.R. 1907.*

(3)—*of annual hereditary allowance—See CIV. PRO. CODE, No. 152, 17 M.L.J. 373.*

(4)—*by two Courts of different grades—Sale by the Court of lower grade, validity of—See CIV. PRO. CODE, No. 162, 6 C.L.J. 130.*

(5) Rent—Attachment for a larger sum than is due—Validity—See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), No. 12, 17 M.L.J. 479.

(6)—*before sale, necessity for—Execution of compromise decree—See COMPROMISE DECREE, No. 4, 6 C.L.J. 95.*

Attachment.—(Concluded).

(7) Effect on, of execution-proceedings being struck off—See *EXECUTION OF DECREE*, No. 10, 11 C.W.N. 168=5 C.L.J. 80.

(8)—before judgment of property outside jurisdiction—See *CIV. PRO. CODE*, No. 236, 3 L. B.R. 255.

(9) Limitation for suit for compensation for unlawful attachment—Attachment not a continuing wrong—See *LIMITATION ACT*, No. 42, A.W.N. (1907), 194.

(10) Small Cause Court's power to award compensation for erroneous attachment before judgment—See *SMALL CAUSE COURT*, No. 1, 77 P.R. 1907=50 P.W.R. 1907.

(11)—before judgment on insufficient grounds—Order for compensation when to be made—Revision—See *CIV. PRO. CODE*, No. 238, 17 M. L.J. 310.

(12) Effect of, before judgment—See *CIV. PRO. CODE*, No. 154, 17 M.L.J. 488.

Auction.

Agreement not to bid against one another, nature and effect of—See *EXECUTION SALE*, No. 1, 6 C.L.J. 111.

Auction purchaser.

Right acquired by, before confirmation of sale, nature of—See *PRE-EMPTION*, No. 19, 10 O.C. 273.

Award.

(1) Application to file private award rejected—Memorandum of appeal—Court fee—Defective private award—Award effecting partition of immoveable property, registration of—See *CIV. PRO. CODE*, No. 260, 84 P.R. 1907.

(2) Private award, decree made on—Appeal—See *CIV. PRO. CODE*, No. 259, 11 C.W.N. 220.

(3) Decree in terms of—Appeal—See *APPEAL (GENERAL)*, No. 1, 4 A.L.J. 89.

(4) Arbitrator holding private and secret enquiries—Misconduct—Award liable to be set aside—See *ARBITRATION*, No. 2, 4 A.L.J. 159.

(5)—directing partition—Stamp—See *STAMP ACT*, No. 2, 8 Bom. L.R. 869=31 B. 68.

(6)—against Hindoo widow or daughter—Effect on reversioners—See *HINDU LAW (CONVERSION)*, No. 1, 4 A.L.J. 365.

(7) Decree on judgment in accordance with—Appeal—See *CIV. PRO. CODE*, Nos. 252 and 253, A.W.N. (1907), 115 and 117.

Award.—(Concluded).

(8) Validity of, when one of the parties do not join submission—See *CIV. PRO. CODE*, No. 244, 4 A.L.J. 347.

(9)—declared void—Maintainability of suit to enforce such award—See *CIV. PRO. CODE*, No. 256, 19 P.R. 1907.

(10)—set aside by lower Court for misconduct of arbitrator—Jurisdiction of Appellate Court to pass decree in terms of award—See *CIV. PRO. CODE*, No. 254, 4 A.L.J. 256=A.W.N. (1907), 110.

(11) Time for setting aside, not expired—Decree passed—Whether final—Appeal—See *CIV. PRO. CODE*, No. 255, 4 A.L.J. 450.

(12)—made but not filed within period fixed, validity—See *CIV. PRO. CODE*, No. 248, 89 P.R. 1907.

(13)—of arbitrators made out of Court—Order refusing to file such award—Appealability—See *CIV. PRO. CODE*, No. 260, 100 P.R. 1907.

(14)—on reference by Court to arbitration—Order of reference not on application of all parties—See *CIV. PRO. CODE*, No. 246, 17 M. L.J. 394.

(15) Private award—Order directing award to be filed under S. 526, C.P.C., whether appealable—See *APPEAL (GENERAL)*, No. 4, 58 P.W.R. 1907. (F.B.).

(16) Appeal from decree in accordance with—See *COURT FEES ACT*, No. 16, A.W.N. (1907), 177.

(17)—made by committee of Oudh Talukdars—See *RES JUDICATA*, No. 23, 6 C.L.J. 13.

Back fee.

Stipulation for, and acceptance of, validity of—See *ACT XVIII OF 1879 (LEGAL PRACTITIONERS)*, No. 1, 45 P.W.R. 1907.

Badni contracts.

Nature of,—See *CONTRACT ACT*, No. 18, 57 P.W.R. 1907.

Banker and customer.

Relationship between—Current Account—See *LIMITATION ACT*, No. 34, 4 A.L.J. 628.

Batta.

Claim to Company's Batta, whether *abwab*,—See *ABWAB*, No. 2, 6 C.L.J. 667.

Benamie transactions.

(1) *Attachment of property in wife's name*
—Onus of proof—S. 106, *Evidence Act*.

Benamée transactions.—(Continued).

A decree-holder attached, in execution of his decree, properties standing in the names of the judgment-debtor's wife and certain other person. The latter put in a claim petition and, on its rejection, instituted a suit. The question to be decided in that suit was whether certain property, which stood for many years in the name of the wife, and which now stood in her name and also in another's name, was held benami for her husband.

Held that, under S. 106 of the Evidence Act, the onus lay on the plaintiffs to show that the purchase-money was supplied by the wife, the first plaintiff, and that the properties had been in enjoyment of the plaintiffs, as these were matters peculiarly within the knowledge of the plaintiffs; and that, as they had failed to discharge the onus, it should be taken that the purchase-money was supplied by the husband and that the properties had all along been in his enjoyment (a). **Sanjivaroya Pillai v. Balambika Ammal**, 17 M.L.J. 339.

BENSON and WALLIS, JJ.

References :—6 W.R. 312 and 8 C. 545, R.

(2) *Suit for land—Right of suit—Limitation Act, Art. 149—Suit by assignees from Government—Applicability of Article to such a suit.*

The question, whether a benamidar should be allowed to sue or not, cannot be made to depend upon the question whether the subject-matter of the suit is land or not, but must depend upon his showing whether the facts of the case are such as to give him some right to sue under the general Law; e.g., it may be shown that the facts are such as to entitle him to sue as an agent of an undisclosed principal on a contract made by him or the facts may be such as to constitute him a trustee for the real owner. Where the legal estate is vested in the benamidar, he is in fact a trustee and as such entitled to sue. The mere fact that a purchase of land is in the name of a certain person is not sufficient to vest the legal estate in the benamidar and constitute him a trustee, viz., where land is purchased benami in the name of a minor the land is not vested in him as trustee (a). Art. 149 of the Limitation Act does not apply, where the plaintiff derives his title by purchase from Government (b). **Koothaperumal Rajah v. Secretary of State**, 17 M.L.J. 174=30 M. 245.

SUBRAHMANIA AIYAR and WALLIS, JJ.

Benamée transactions.—(Concluded).

References :—(a) 15 M. 52, 21 M. 30, 3 W.R. 159, 25 C. 98, 30 C. 265, 15 M. 261, 30 M. 88, 16 C. 364, 25 C. 874 and 18 A. 69, R. (b) 19 M. 154, 31 I.A. 203 (207), 28 M. 505, R.

(3) *Decree against benamidar—Beneficial owner—Bound by the decree—Subsequent suit for redemption.*

A decree passed against a benamidar, in a suit brought against him, binds the beneficial owner, just in the same way as a decree in a suit, brought by a benamidar. Where a decree gave the benamidar an opportunity to redeem, and he did not avail himself of it, *held* that the beneficial owner could not maintain a suit to redeem. **Kaniz Fatima v. Wall-Ullah**, 4 A.L.J. 689=A.W.N. (1907) 272.

AIKMAN, J.

(4) *Whether application by, saves limitation—See EXECUTION OF DECREE, No. 5, 10 O.C. 263.*

(4-a) *Sale of putni taluq for arrears of rent—Payment by mortgagee—Purchase of mortgagor's interest benamée—Suit for contribution against such purchaser—See CONTRACT ACT, No. 29, 34 C. 92.*

(5) *Suit against benamidar for recovering rent received—See LIMITATION ACT, No. 69, 17 M.L.J. 224.*

(6) *Right to set aside fraudulent transfer on ground of benamée—See FRAUDULENT TRANSFERS, No. 1, 3 L.B.R. 245.*

(7) *Plea of fraud—See FRAUDULENT TRANSFERS, No. 2, 9 Bom. L.R. 542.*

Bengal and Assam Laws.

See ACT VII OF 1905 (BENGAL).

Bengal Council Act.

See ACT VIII OF 1869 and ACT VI 1870.

Bengal and N.W.P. Civil Courts Act.

See ACT XII OF 1887 (BENGAL).

Bhagdharee and Narwadharee Act.

See ACT V OF 1862 (BOMBAY).

Bhowli rent.

(1)—commutation of, into Nakdi rent—Power of Court of Wards—Annulment of commutation, right to—See COMMUTATION, No. 1, 6 C.L.J. 727.

Bill of Lading.

(1) *Provision in the, as to exemption of carriers from liability, effect of—See CARRIERS, No. 2, 1 M.L.T. 387=16 M.L.J. 573=30 M. 79.*

Birt rights.

- (1) —in Oudh—*Bai birt*—Gonda Settlement Report—*Birt zemindari*—Heritable and transferable under proprietary rights—Record-of-rights Circular No. 2 of 1861, policy of.

Under the Record-of-rights Circular No. 2 of 1861, holders of *bai birt* tenures, created by talukdars or proprietors of estates in Oudh, and spoken of in the Gonda Settlement Report as *birt zemindari*, acquired, upon the annexation of Oudh by the British Government, absolute under-proprietary rights as against the talukdars. Such tenures are heritable and transferable. **Raja Muhammad Mumtaz Ali Khan v. Murad Bakhsh**, 11 C.W.N. 913 (P.C.)=9 Bom. L.R. 851=17 M.L.J. 400=6 C.L.J. 693=2 M.L.T. 402=4 A.L.J. 737.

LORD MACNAGHTEN, LORD ATKINSON, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

Boundary Dispute.

- (1) Jungle land—Duty of Court to settle boundary, when evidence insufficient—See EVIDENCE ACT, No. 9, 11 C.W.N. 230.

Buddhist Law.

- 1.—DIVORCE.
- 2.—GIFT.
- 3.—INHERITANCE.
- 4.—MARRIAGE.
- 5.—PARTITION.
- 6.—PRE-EMPTION.

—————1.—(Divorce).

- (1) Divorce by mutual consent—Partition of property—*Atet*—*Lettetpwa* property—*Nissayo* and *Nissito*.

In a suit for divorce by mutual consent and for partition of property, *held*, on the authority of the *Manugye*, Book XII, S.3, that, where the relation of *Nissayo* and *Nissito* subsists between the husband and the wife with respect to *atet* property, the wife, if she is the *Nissito*, is entitled to one-third of such property; she is also entitled to a third of the undivided ancestral property, which was inherited by her husband during the marriage. The profits of the *atet* or *pany* property are *lettetpwa*, and the inherited a property being itself *lettetpwa*, its profits are *lettetpwa* also. The partition of such *lettetpwa* property should be made equally, if it was acquired by the joint exertions of the married couple. **Mi Myla v. Nga Twe**, U.B.R. (1906), Buddhist Law—Divorce, 19.

Buddhist Law.—(Continued).

—————1.—(Divorce).—(Concluded).

References:—U.B.R. (1892-96), II, 121, 10 B.L.R. 49, U.B.R. (1897-1901), II, 146, S.J.L.B. 110=1 L.C. 195, R.; U.B.R. (1897-1901), II, 39 and U.B.R. (1902-1903), B.L. Inheritance, 1, affirmed.

—————2.—(Gift).

See GIFT, No. 1, U.B.R. (1907), Buddhist Law—Gift, 1.

—————3.—(Inheritance).

- (1) Right of daughter of divorced wife to succeed to her father's property as against his sister.

Where the husband divorces his wife, after she was conceived, and dies without other wife child or grandchild, the child by the divorced wife is to succeed to his estate. If the father lived alone, the child succeeds to the whole estate. If the father lived with his co-heirs, the child succeeds to half and the co-heirs to the other half. Therefore, where a person dies leaving only a sister and a daughter by a divorced wife, they share his property equally. The rule that the daughter of a divorced wife, who lives with the mother and does not maintain filial relations with the father, is not entitled to a share of his estate, does not apply to the above case. **Mi Nyo v. Mi Nyein Tha**, U.B.R. (1906), B.L. Inheritance, 15.

SHAW, J.C.

References:—U.B.R. (1892-96) II, 22, 159, U.B.R. (1897-1901), 116, 135, 193, 166, R.

—————4.—(Marriage).

- (1) Right of female minor to sue for compensation for breach of promise of marriage, independently of contract—See CONTRACT ACT, No. 2, U.B.R. (1907), Contract, 5.

—————5.—(Partition).

- (1) See BUDDHIST LAW (DIVORCE), No. 1, U.B.R. (1906), B.L. Divorce, 19.

—————6.—(Pre-emption).

- (1) Pre-emption, widow's right of—Widow's right to inherit.

According to Buddhist Law, a person selling ancestral property, whether it has been divided or not, must offer it to his co-heirs, before selling it to strangers. A sale to strangers effected without such offer is invalid, if the co-heirs promptly assert their rights (a).

Buddhist Law.—(Concluded).

—6.—(Pre-emption).—(Concluded).

A Buddhist widow is the heir of her husband, whether there are children or not. The eldest son has a right to claim one-fourth of the death of the father, but this fact does not alter the position of the widow (b).

Where the widow has inherited her deceased husband's share, and the co-heirs of the husband have sold their shares to strangers, the widow has the right of pre-emption. Such right to pre-empt will be strengthened all the more by the fact that she has a son by her deceased husband. **Nga Tin v. Nga Shwe On** U.B.R. (1907), Buddhist Law (Inheritance and Pre-emption), 1.

SHAW, J.C.

References :—(a) 20 M. 298; U.B.R. (1897—1901), 231; S. J. L. B. 39, 41, 76; P. J. L. B. 26; U. B. R. (1897—1901), 155 and 162; 1 L. B. R. 144=2 L.C. 129 and 7 A. 775, R; (b) U.B.R. (1892—96), 121; U. B. R. (1897—1901), 146; S.J.L.B. 76; U.B.R. (1892—96), 581, R.

Buildings.

Sanction for constructing—Implied sanction—See ACT XX OF 1891 (PUNJAB MUNICIPAL ACT), No. 1, 62 P.R. 1907.

Burden of proof.

(1) *Suit by plaintiff for possession as heir of his father—Defendant alleged the plaintiff to have been adopted by another—Admission by plaintiff of his having been so adopted—Nature of such admissions—Estoppel.*

M and his transferees brought two suits for possession of property left by one P, the natural father of M. The defence was that the plaintiff could not inherit, inasmuch as he was adopted by K. The defendant filed several documents, in which the adoption was admitted by M himself. *Held*, that the burden of proving that the adoption relied upon took place, rested on the defendant. But that burden was, *prima facie*, shifted by her proving his solemn statements under hand and seal that it did take place. The defendant not being a party to those documents, the said statements did not amount to estoppel, but the party making the statements could rebut the presumption that they were true. The express admissions of a party to a suit, or admissions implied from his conduct, are evidence, and strong evidence against him; but he could show that those admissions were

Burden of proof.—(Continued).

mistaken or not true (a). **Rani Chandra Kunwar v. Narpet Singh**, 4 A.L.J. 102 (P.C.)=11 C.W.N. 321=5 C.L.J. 115=17 M.L.J. 103=2 M.L.T. 109=9 Bom. L.R. 267=29 A. 184.

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References :—(a) 6 M. and W., 664; 9 B. and C. 577; 12 Q.B. 926; 2 Ch. D. 72; and 1896 A. C. 587 referred to.

(2) *Suit by a reversioner to restrain alienation of occupancy rights—Custom—Punjab Tenancy Act (1887), S. 59.*

Where a collateral seeks to restrain an alienation of an occupancy right by an occupancy tenant, the initial *onus* lies on the plaintiff; but when he has proved his reversionary right, and his right to bring such a suit in the case of any other proprietary right, the *onus* will be shifted to the other side; and the person who asserts that no such custom obtained as to occupancy right has to prove his contention (a). **Abdullah v. Allah Dad**, 98 P.R. 1907 (F.B.)=62 P.W.R. 1907.

CLARK, C.J., CHATTERJI and ROBERTSON, JJ.

References :—(a) 115 P. R. 1901; 12 P. R. 1904; 89 P. R. 1898 (F.B.), R.

(3) *Deed executed for valuable consideration—Suit to set aside deed—Plaintiff party to suit—Onus.*

In a suit to set aside a deed, to which the plaintiff has been a party, the *onus* lies on him to make out a case for setting aside, on equitable grounds, a deed duly executed for a valuable consideration. **Ashidbai v. Abdulla Haji Mahomed**, 8 Bom. L.R. 652=31 B. 271.

CHANDAVARKAR, J.

Reference :—7 App. Cas. 311, F.

(4) *Mortgage bond—Denial of execution and passing of consideration by third party.*

If an action to enforce a mortgage security is contested by the mortgagor and execution is admitted by or proved against him, the *onus* lies upon him to prove that the recitals as to the payment of consideration for the deed which he executed are untrue. When it is contested by a stranger, who denies that the bond was executed and also asserts that there was no consideration for the mortgage, the *onus* is upon the mortgagee to prove his case. **Bhishwar Dayal v. Harbans Sahay**, 6 C.L.J. 659=3 M.L.T. 38.

BRETT and MOOKERJEE, JJ.

Burden of proof.—(Concluded).

References :—C. 268, 17 A. 428, 5 C. W.N. 408, 5 C.L.J. 653 (658), R; 8 C.W.N. CCCXXIV, *Dis*.

(5)—of non-receipt of consideration for a compulsorily registerable registered deed—See EVIDENCE, No. 4, 8 P.W.R. 1907.

(6) Suit for declaration that a deed of sale is not binding on plaintiff, being in fraud of creditors—Burden on plaintiff to establish affirmatively an intent to delay or defeat creditors—See TRANSFER OF PROPERTY ACT, No. 22, 17 M.L.J. 11.

(7) Marriage, evidence of—Conduct of relations and friends—Documentary and oral evidence—See MARRIAGE, No. 1, 5 C.L.J. 1. (P.C.) = 9 Bom. L.R. 264.

(8) Suit on registered mortgage bond—Want of consideration—Burden lies on the mortgagor—See ACT XVIII OF 1884 (PUNJAB), No. 4, 19 P.L.R. 1907.

(9) As to whether transaction is sale or mortgage—See EVIDENCE ACT, No. 28, 3 L.B.R. 250.

(10) Nucleus of ancestral estate—Earnings of a member from Government service thrown into common stock—See HINDU LAW (JOINT-FAMILY), No. 9, 11 C.W.N. 417.

(11)—where inamdar imposes enhanced rent on mirasdar—See RENT, No. 1, 9 Bom. L.R. 861.

(12) Mortgagee—Auction-purchaser and reversioner—contest between—Infancy of reversioner at the time of the mortgage—Effect—See HINDU LAW (ALIENATION), No. 1, 6 C.L.J. 490.

Burial.

(1) Right of—and of reciting prayers before burial—Civil right—See CIV. PRO. CODE, No. 10, 16 M.L.J. 471 = 1 M.L.T. 428 = 30 M. 15.

Carriers.

- (1) *Contract to carry partly by steamer and partly by rail—Divisibility of contract—Omission of consignor to declare value and description of goods as required under the provisions of Carriers Act and Railways Act—Liability for damages for loss of the goods.*

Where through-booking, first by steamer and then by rail or vice versa, is made for public convenience, and when the journey is performed partly in steamers of one company and

Carriers.—(Continued).

partly in trains of another, and the charges creditable to each are subsequently adjusted the contract is divisible so far as the two portions of the journey are concerned.

Where a consignor failed to declare the value and description of the goods as required under the provisions of the Carriers Act and the Railways Act, and sued the steamer company for damages for loss of the goods so carried partly by steamer and partly by rail, held that, so far as the journey was by steamer, the steamer company is entitled to claim, as regards the acts of its agents and servants, the protection afforded by the provisions of the Carriers Act, and so far as the journey was by rail, it is similarly entitled to claim the protection afforded by the Railways Act. **Narang Rai Agarwalla v. River Steam Navigation & Co., Ltd.**, 34 C. 419 = 11 C.W.N. 107.

BRETT, J.

References :—L.R. 1 Q.B. 54, 38 L.J.Q.B. 137, 18 C.B. 226, R.

- (2) *Liability of, for negligence and damage to goods—Bill of lading—Provision as to exemption from liability, effect of.*

The goods (rice bags) belonging to the plaintiff were shipped in a steamer belonging to the defendant company, for delivery to the plaintiff's agent at another port, and, on arrival at that port, were placed by the company on the foreshore, where, however, they were destroyed under the orders of the Municipal authorities, on the ground that they had become damaged by rain and unfit for consumption.

The condition in the Bill of lading ran thus :—“ In all cases and under all circumstances, the liability of the Company shall absolutely cease, when the goods are free of ships's tackle, and, thereupon, the goods shall be, for all purposes and in every respect, at the risk of the shipper or consignee.”

In a suit by the plaintiff for recovery of the value of the rice so damaged.

Held—Per SUBRAHMANYA AYYAR, J.—The Company, in landing the goods without precautions to prevent damage to them, failed to take the same care of the plaintiff's goods as a prudent person would, in similar circumstances, have taken of like goods of his own, and the damage was, therefore, the result of the Company's negligence. The condition in the Bill of lading puts an end to the Company's liability as carriers, when the goods leave the

Carriers.—(Continued).

ship's tackle, but constitutes their subsequent possession, until delivery, as that of bailees. For, if it were otherwise, the Bill of lading might be construed so as to exempt the Company even from wilful misconduct on the part of the Company's servants (a).

Per MILLER, J. (contra).—The Company are amply protected, against all responsibility, by the terms of the Bill of lading and are, therefore, not liable for damages. The general exception of negligence will apply to all stages of the transaction covered by the contract, and is not restricted to that stage, during which the goods are actually in the ship (b); but if there is a special clause dealing with a particular stage of the transaction, that must be applied, to the exclusion of the general exception (c), and it has been frequently held that an exception against negligence is valid if clearly expressed (d). **K.Y.S. Sheik Mahamed Ravuthar v. The B.I.S.N. Company**, 1 M.L.T. 387 = 16 M.L.J. 573 = 30 M. 79.

SUBRAHMANIA AIYAR and MILLER, JJ.

References :—(a) 10 Q. B. 256, *F*; 26 I.L.T. 704, *Cons.*; 22 B. 184, *R.* (b) 13 B. 571, 10 C. 486, *Compd.* (c) 22 B. 184, *Compd.* (d) 10 C. 489, 13 B. 571, *F.* (e) 32 L.J.Q.B. 77, *Appl.*

- (3) *Carrier's Act (III of 1863), Ss. 3, 8 and 9—Through-booking of goods by steamer and rail—Liability of Steamer Company for loss during transmission by rail—Railways Act (IX of 1890), S. 75.*

The plaintiff consigned a parcel of silk articles through the Indian General Steam Navigation and Railway Company, Ltd., for delivery at Khagra, knowing that the articles would be carried in the first instance by the defendant Company, then by the Eastern Bengal State Railway and then by the East Indian Railway Company. They did not declare the value of the articles which exceeded Rs. 100, nor disclose the contents of the parcel. It was found that the goods were lost, after they had been made over to the Eastern Bengal State Railway.

Held, that the agreement was in substance with both the Steam Navigation Company and the Railway Companies, and the former could not be held responsible for the loss (a). **Gokul Chandra Das v. Indian General Steam Navigation and Railway Co., Ltd.**, 11 C.W.N. 1076.

MITRA and CASPERSZ JJ.

Reference :—(a) 11 C.W.N. 1071, *F.*

Carriers.—(Concluded).

- (4) Suit against a Carrier for compensation for non-delivery of goods, governed by Art. 31 of the Limitation Act—See LIMITATION ACT (XV OF 1877), No. 62, 108 P.R. 1906 = 2 P.L.R. 1907.

- (5) Railway Company's liability for loss of passenger's luggage—See ACT IX OF 1890 (RAILWAYS), No. 3, 73 P.R. 1907.

- (6) Duty of Railway Company as—Burden of proof—See ACT IX OF 1890 (RAILWAYS), No. 2, 3 N.L.R. 94.

- (7) Receipt of goods by one Railway Company for carriage over its own and another Company's land—Liability in respect of over charge made by delivering Company—Byelaws—Power of Railway Company to alter the principle of calculation of rates—See CONTRACT, No. 2, 2 M.L.T. 42.

Caste.

- (1) *Caste question—Relief in caste matters—Right of a member of a caste to inspect documents and books of account relating to caste property—Injunction where such inspection refused.*

Where a member of a caste, who was also a trustee of the caste property, was refused inspection of books of accounts, documents, etc. by the President of the Managing Committee of the caste, *held*, that an injunction could be granted, restraining the President from refusing such inspection (a).

Every member of a caste, being interested in its affairs, has a right, incidental to his membership, to every information, which the books, records, and documents of the caste can give him, to enable him to discharge the duties he owes to the caste. It is a right similar to that of a partner in a firm to the partnership books and can be taken away from him only by an express caste rule, resolution or usage. But a trustee or a member of a caste has such right to inspection, only for the *bona fide* purpose and in the interests of the caste, and not for any purpose hostile or injurious to those interests.

Though a Court will not interfere with the jurisdiction and discretion of a caste as regards its internal purposes and management, with reference to which it is its own master to frame rules and regulations, yet it will interfere in favour of any individual member of the caste, as against any other member or members of it, where the Court is asked to give effect to any

Caste.—(Concluded).

rule, resolution, or usage of the caste, if the right claimed in virtue of such rule, resolution, or usage, is a civil right cognizable by the Court. In giving relief in such cases, the Court, so far from interfering with the autonomy of the caste, or encroaching upon its jurisdiction as to its internal affairs, recognises them by giving effect to its rule, resolution, or usage. **Chapsey Cooverji v. Jethabhai Nursey**, 9 Bom. L.R. 569.

CHANDAVARKAR, J.

Reference :—(a) 19 B. 507, R.

Cause of action.

(1) Words imputing unchastity to wife afford, to husband without proof of special damage—See **DEFAMATION**, No. 1, 4 C.L.J. 388=34 C. 48.

(2) Fee for medical attendance—Part paid by writing a promissory-note—Suit on promissory-note—Second suit for balance, barred—See **CIV. PRO. CODE**, No. 44, 4 A.L.J. 85.

(3) Several breaches of covenant made under one contract—Maintainability of separate suits for each breach—Effect of agreement to bring separate suits—See **CIV. PRO. CODE**, No. 45, 28 P.R. 1907.

(4) See **RES JUDICATA**, No. 19, 55 P.R. 1907.

(5) Suit on an oral agreement embodied in an unstamped pro-note—Admission by defendant—See **STAMP ACT (II OF 1899)**, No. 5, 66 P.R. 1906=73 P.L.R. 1907.

Caveat emptor.

Application of maxim of—See **SALE**, No. 1, U.B.R. (1907), Evidence, 1.

Certified purchaser.

(1) Meaning of—See **CIV. PRO. CODE**, No. 184, 8 Bom. L.R. 873=31 B. 61.

Cess Act.

See **ACT II OF 1877 (BENGAL)**.

Charge.

(1) Suit for redemption converted into one for recovery of property on payment of a—See **PLEADINGS**, No. 2, 10 O.C. 17.

(2) When a mortgage fails as such, the deed will take effect as a—See **TRANSFER OF PROPERTY ACT**, No. 84, 17 M.L.J. 39.

(3) Suit for sale on foot of mortgage of property subject to a charge for maintenance—See **TRANSFER OF PROPERTY ACT**, No. 55, 3 A.L.J. 848=A.W.N. (1907), 18.

Charge.—(Concluded).

(4) Suit for recovery of property subject to—See **VALUATION OF SUIT**, No. 3, 10 O.C. 42.

Charity.

(1) *Immoveable property—Dedication to charity—Agiari—Man in possession—Right to sue for trespass.*

A person, who dedicates his immovable property to charity (e.g. for constructing and maintaining an *Agiari* for Parsees), can maintain an action with respect to trespass to the property. **Pestonji Nusserwanji v. Nemchand Maneckchand** 9 Bom. L.R. 1801.

RUSSELL, J.

(2)—by a Parsi donor—Applicability of Cy pres doctrine—See **CY PRES DOCTRINE**, No. 1, 9 Bom. L.R. 1203.

(3) Mixing up of charitable purposes with other indefinite purposes, effect of—See **WILL**, No. 2, 9 Bom. L.R. 560.

(4) Bequest for charitable purposes—See **MAHOMEDAN LAW (WILL)**, No. 2, 75 P.R. 1907.

Chhimba.

(1)—occupancy tenant, gift by, to his daughter's sons—Suit by reversioners to contest alienation—**Punjab Tenancy Act**, Ss. 59, 60, &c.—Presumption as to tenant's competency to alienate—Proof—See **CUSTOMS (PUNJAB)**, No. 62, 60 P.W.R. 1907.

Chose-in-action.

(1) Assignee of negotiable instrument as assignee of chose-in-action—**Transfer of Property Act**, Ss. 130 and 137—See **PROMISSORY NOTE**, No. 4, 17 M.L.J. 393.

(1) Assignment of the benefit of a contract is a—See **STAMP ACT**, No. 1, 9 Bom. L.R. 119.

Chota Nagpur Encumbered Estates Act.

See **ACT VI OF 1876 (BENGAL)**.

Chota Nagpur Landlord and Tenant.

See **ACT I OF 1879 (BENGAL)**.

Chowdhris.

Right to receive fees as—See **DECLARATORY SUIT**, No. 1, A.W.N. (1907), 228=4 A.L.J. 715.

Chowkidari Act.

See **ACT VI OF 1870 (BENGAL)**.

Chowkidari Chakran Land.

- (1) *Resumption—Title—Chowkidar, power to appoint.*

Certain chowkidari chakran lands were resumed by the Government and transferred to the holder of the Zemindari, within which they were situated. Long anterior to this, the whole of the Zemindari, excluding certain lands in the *khass* possession of the Zemindar, had been granted in *putni*. The putnidar claimed to be entitled to the resumed lands. The Zemindar and the lessee from him resisted the claim, on the ground that, as under the *putni* lease, right was reserved to the Zemindar to appoint Chowkidars upon a vacancy arising in the office, the Zemindar was entitled to the lands upon resumption :

Held, that the fact that the Zamindar was entitled to make an appointment to the office of Chowkidar, did not create in him an interest in the lands held by the Chowkidars, which, upon resumption and transfer to the Zemindar, would pass to the putnidar, from whose lease they had not been excepted. **Girish Chandra Roy v. Hem Chandra Roy**, 5 C.L.J. 28.

STEPHEN and MOOKERJEE, JJ.

- (2) *Chowkidari assessment—Arrears for three years—Act VI of 1870 (B.C.), S. 55—Act XI of 1859, Ss. 5 and 6—Sale for arrears of three years—Sale, validity of.*

S. 55 of Act VI of 1870 (B.C.) does not prohibit the Collector selling the land for the arrears of Chowkidari assessment of more than one year. If he so sells, his proceedings are irregular, but the sale is not necessarily or *ipso facto* void.

If a Collector issues a notice under S. 6, instead of under S. 5 of Act XI of 1859, it is a mere irregularity which does not render the sale a nullity (a). **Maharaja Sir Jatindra Mohun Tagore Bahadur v. Jogendra Nath Roy**, 6 C.L.J. 99 = 11 C.W.N. 1107.

RAMPINI, C.J., and SHARFUDDIN, J.

References :—(a) 31 C. 256 = 31 I.A. 52 and 32 C. 111, R.

- (8) *Resumption of, settlement with zemindar, sale for non-payment of Government revenue—Surplus sale proceeds, apportionment of.*

When chowkidari chakran lands, after resumption and transfer to the Zemindars, have been sold for non-payment of the Government assessment, the Zemindar as also the putnidar

Chokidwari Chakran Land.—(Continued).

are entitled to share in the surplus sale proceeds, provided the chakran lands are included within the *putni* grant. The determination of this question does not depend upon the decision of the question of the right of the putnidar to hold the chakran land, upon payment of additional rent. **Hari Das Goswami v. Nistarini Gupta**, 5 C.L.J. 80.

STEPHEN and MOOKERJEE, JJ.

- (4) *Resumption and settlement with Zemindar—Right of putnidar to possession—Liability to pay revenue assessed—See Act VI of 1870 (VILLAGE CHOWKIDARS BENGAL), No. 1, 11 C. W.N. 201 = 5 C.L.J. 33 = 34 C. 109.*

Civ. Pro. Code (Act XIV of 1882).

- (1) *Summons by the respondent on the appellant—Non-appearance of the appellant as witness—Suit to recover batta.*

When the appellant failed to appear in pursuance of the summons served on him at the instance of the respondents, he had no right to retain the batta paid to him to cover the expenses of his attendance, and the respondents whose money was paid are entitled to recover it as money had and received by the appellant (a). There is nothing in the Code or in the rules enacted thereunder, restricting the respondents to proceedings to be taken in the cause by way of application for taxation of costs and recovery of it as such (b). **Nataraja Desikar v. Yeerabadran Chetty**, 17 M.L.J. 143.

SUBRAHMANIA Aiyar and BENSON, JJ.

Reference :—(a) 26 L.J.Q.B. 39, F. (b) 5 W.R. S.C. Ct. Ref. 6.

- (2) *Not exhaustive—See Civ. Pro. Code, No. 34, 5 C.L.J. 611.*

- (3) *Ss. 2, and 102—Order dismissing a suit for default—Whether decree—Provincial Small Causes Court Act, S. 17.*

Held by a majority of Full Bench (Birks, J. dissenting) that an order dismissing a suit under S. 102 of the Code does not involve the making of a decree within the meaning of S. 2 of the Code (a).

Held also (Birks, J. dissenting) that, even if the contrary view prevails, a decree passed on an order of dismissal for default, under S. 102 of the Code, is not a decree passed *ex parte* and, therefore, the proviso to sub-sec. 1 of S. 17 of the Provincial Small Cause Courts Act does not apply to it. **Maneck Bai v. P. L. S. A. Meethiah Chetti**, 4 L.B.R. 17 (F.B.).

WHITE, C.J., and BIGGE and BIRKS, JJ.

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

References:—(a) 15 A. 859 and 22 M. 221, F. 16 C. 98, 28 C. 827, 23 C. 215, 8 A. 108, 18 A. 101 (F.B.) and 19 B. 307, R. 16 B. 28, 80 C. 660 = 7 C.W.N. 486, Diss. (b) 2 C.W.N. 693, F.

- (4) *Ss. 2, and 232—Application for execution by assignee from decree-holder—Court's sanction unnecessary before transfer of decree.*

"Decree-holder" is defined in S. 2 as including a person, to whom a decree has been transferred, and S. 232 itself appears to recognise that the decree has been transferred, before the transferee applies to execute it. There is nothing in S. 232 to make transfers of decrees conditional upon obtaining the sanction of the Court. It is the assignment in writing, which effects the transfer. **Abboy Naidu v. Muthukrishna Naidu**, 2 M.L.T. 93.

BENSON and WALLIS, JJ.

References:—16 A. 483, R; 2 M. 216, *Expl.*

- (5) *Ss. 2 and 232—Application by transferee of decree-holder—Limitation Act, Art. 179.*

An application by the transferee of a decree for execution, under S. 232 of the Code, is an application by a decree-holder, and is, therefore, in accordance with law. **Subbaya Chetty v. Rangaswamy Chetty**, 2 M.L.T. 339.

BENSON and WALLIS, JJ.

References:—14 M.L.J. 393, F; 20 C. 388, D.

- (6) *Ss. 2 and 523—Agreement to refer to arbitration—Order of reference—Decree—Appeal.*

Where a Court, acting under S. 523 of Civ. Pro. Code, causes an agreement to refer to arbitration to be filed and makes an order of reference, the order is a decree, within the meaning of that expression as defined in S. 2 of the Code, and is, therefore, appealable. **Narpat Rai v. Devi Das**, 126 P.R. 1907.

JOHNSTONE and RATTIGAN, JJ.

References:—84 P.R. 1901 (F.B.), 25 P.R. 1902 (P.C.), 27 M. 255, 29 M. 303, 33 M. 757, F.; 26 A. 205, 28 A. 21, *not appr.*

- (7) *Ss. 2, 540 and 588 (c)—Decree—Order—Order adjudicating rights of defendants in an interpleader suit—Appeal.*

The adjudication upon the claims of the defendants in an interpleader suit is a decree, and stands on the same footing as an adjudication of any other claims, and is appealable under the provisions of S. 540. The direction as to interpleading is an order and appealable

Civ. Pro. Code (Act XIV of 1882).—(Concl.).

under S. 588 only. **Maharaj Singh v. Chhittar Mal**, 4 A.L.J. 688 = A.W.N. (1907) 270.

BANERJI J.

- (8) *Ss. 4, 545, 639, 647—Applicability of, to insolvency proceedings in Rangoon—See INSOLVENT, No. 2, 3 L.B.R. 241.*

- (9) *S. 11—Suit by trustee against co-trustee—Cognizability of questions of ritual by Civil Courts—Right to restrain interference with the Namams in a temple—Introduction of new idols, effect of—Position of Dharmakarthis.*

Under S. 11, a *Dharmakartha* of a temple has a right to sue his co-trustees, for an injunction prohibiting them from changing the form of, or in any way interfering with, the Thengalai Namams in the temple, and directing them to remove from the temple a copper image of Vedanta Desikar introduced thereinto by them. The stone and chunam Namams are part of the property of the temple vested in the trustees, and their removal or alteration is an interference with the right of the plaintiff, in respect of the property. Although the putting on or taking off of such things as Namams are ordinarily not matters of civil nature, the wholesale substitution of Vadagalai for Thengalai emblems in a Thengalai temple is an interference of the temple structure, and the interference of the Civil Courts may be justified, on the ground that the temple is property and that the Thengalais, for whose worship it is and must be taken to have been largely, but not exclusively dedicated, have a right to object to alterations in the temple structure, which would affect its character as a Thengalai institution.

In such temple matters, the only safe guide in this country is usage, and if the usage of an institution is found to be Thengalai in character, a departure from such usage, by a wholesale alteration of the form of the Namam displayed in the temple and the consequent change in the character of the predominating influence therein, is *prima facie* not within the power of the trustees, and the trustees can, in the absence of any justification, be restrained from making such a change.

There is *prima facie* no reason why the trustees should not permit the devotees of Vedanta Desikar, whose image in stone stands in the temple, to introduce a second and portable image to be used, if necessary, in processional ceremonies. To permit this does

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

not in any way change the distinctive Thengalai character of the temple, nor is the introduction of the image a sacrilegious act; and the fact that the Thengalais object to the presence of this image is not necessarily a reason for removing it, and no injunction, therefore, need be granted against the trustees in this matter.

Whether the Dharmakarthas of a Hindu temple are trustees in whom the temple properties are vested, or whether the temple properties are vested in the temple deities, and the Dharmakarthas are rather in the position of manager, it may, in practice, be necessary for Civil Courts to deal with them as trustees for the general body of worshippers of the temple. If, as Dharmakarthas, they commit a breach of trust cognizable by the Civil Courts, they may be restrained at the suit of the other Dharmakarthas or worshippers.

A suit is not a suit of civil nature, merely because the facts constituting the cause of action are alleged to amount to a breach of trust. If, on examination, it should appear that they relate merely to religious rites or ceremonies, such questions may, of course, be gone into, as stated in the explanation to S. 11, if the right to property or an office depends on them. But it cannot be contended that, as the trustees hold on trust to provide for carrying on public worship at the temple, according to the mamul or usage of the institution, every departure from such usage is a breach of trust, for which they can be sued in a Civil Court.

The right of a worshipper to worship at a given temple is recognised by the Courts as a civil right, and the Courts will enforce by suit a right of worship, to which the plaintiff proves himself entitled, and will also protect such a right in various ways. **Krishna Sami Iyengar v. Singarachariar**, 17 M. L. J. 1=2 M. L. T. 69=30 M. 158.

MILLER and WALLIS, JJ.

References:—5 B. 80, 1 M. H. C. R. 301 (304), 2 M. 62, 4 M. 315, 13 M. 293, 16 M. 299, 23 M. 298, 28 M. 23, 11 M. L. J. 215, 12 M. L. J. 355, 16 M. L. J. 150, 7 C. 767, 18 C. 448 (458), 32 C. 1072, R.

(10) S. 11—*Explanation—Suit of Civil nature—Right of burial and of reciting prayers before burial.*

In suits relating purely to rituals or religious observances, the Civil Courts have no jurisdic-

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

tion; but the Courts are bound to enquire into the questions of religion or ritual, which are material for determining civil rights in dispute between the parties (a).

When the matter is of a mixed spiritual and temporal character, the question will depend upon the nature of the connection between the facts, and will be, in fact, whether the spiritual question is so intrinsically connected with the temporal, as to be inseparable from it. If so, it would be the duty of the Courts, in trying the civil disputes, to enquire into the spiritual matter thus intimately related.

The right of burial is a civil right (b) and, if the recitation of prayer at a particular spot in the mosque is a necessary part of the burial, and the plaintiffs are hindered from exercising their customary right in such matter, the interference by the defendants would mean invasion of their right, giving rise to a suit cognizable by Civil Courts. **Kooni Mohamadan Meera Sahib Tharagan v. M. Mamadu Meera Sahib Tharagan**, 16 M. L. J. 471=1 M. L. T. 423=30 M. 15.

SUPRAHMANIA AIYAR and MILLER, JJ.

References:—(a) 7 B. 323, R. (b) 26 B. 198, R.

(11) S. 11—*Right of hereditary joshi to recover marriage fees from an intruder.*

Where a person claimed to be the hereditary *joshi* of a certain village and to recover from an intruder certain fees payable to the *joshi*, but paid to the intruder, *held* that the fact that emoluments are claimed makes the dispute one of Civil nature within the meaning of S. 11, and that, therefore, the *joshi's* suit to recover the fees is maintainable. **Yeshwant Rao v. Bhaskar Rao Patwari**, 3 N. L. R. 47.

DRAKE-BROCKMAN, OFFG. J.C.

References:—7 M. 424, 14 B. 167, R; 11 B. H. C. R. 6, F.

(12) S. 11—*Man-pan—Right to sue in Civil Courts.*

A suit to enforce the following rights, which are usually described in *Berar* by the word *man-pan*, does not lie in a Civil Court.

(1) Right to have precedence in leading one's bullock at Pola (a).

(2) Right to give the first blow to a buffalo at Daschra (b).

(3) Right to gifts of cake and fuel at the Holi festival and betel-nuts at weddings.

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

(4) Right to *Pandharegandh*, which means a small present of money given by the bridal party to the senior member of the Patel family at weddings (c). **Shiwaji v. Mahadeo**, 3 N.L. R. 181.

BATTEN, A.J.C.

References:—(a) 2 B. 476, 6 B. 110, F. (b) 10 B. 233, R. (c) 16 B. 281, 11 M. 450, 15 C. 159, 2 M. 62 (P.C.), 21 C. 463, R.

(13) S. 11—Jurisdiction to try Municipal election suits—See ACT III OF 1888 (BOMBAY MUNICIPALITY), No. 2, 9 Bom. L.R. 417.

(14) Ss. 12, 13 and 622—Scope of Ss. 12 and 13—Procedure to be adopted under both the sections—Dismissal of suit rightly, though on wrong grounds—High Court's power of revision.

Where a suit is first instituted in a Sub-Judge's Court, and a second suit is instituted for the same relief in a District Munsiff's Court, the District Munsiff ought to dismiss the suit before him, as barred by S. 12, and not merely keep it, pending the decision of the earlier suit in the Sub-Judge's Court. S. 12 is in some respects similar to the principle of S. 13 (a), and both are aimed against superfluous suits, and the procedure under both the sections ought, therefore, to be the same. Where the Munsiff, under the above circumstances, did not dismiss the suit, but kept it pending, and then it was moved into the Sub-Judge's Court, and dismissed by him, the District Judge has jurisdiction to hear the appeal against that decision, and should do so. Where the District Judge rightly dismisses such an appeal, though on wrong grounds, the High Court will not interfere in revision. **Yenkappachari v. Manjunatha Kamti**, 16 M. L. J. 526 = 2 M. L. T. 40.

MILLER, J.

Reference:—(a) 11 A. 154, R.

(15) S. 13—*Res judicata*—Erroneous opinion on a point of law how far conclusive.

• An erroneous opinion on a point of law may be, between the parties to it, but not further, a sufficient *res judicata* to preclude them from re-agitating it. **Waman Hari Deshpande v. Hari Yithal Parulekar**, 8 Bom. L.R. 932 = 31 B. 128.

RUSSELL, AG.C.J., and BEAMAN, J.

References:—8 Bom. L.R. 367 and 12 B. 411, Expl. and discussed; 13 B. 390, R.

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

(16) S. 13—*Res judicata*—"Might"—The claim to be barred must be within the knowledge of the person during the first suit.

The plaintiff first brought a suit as heir of her father, claiming that an account should be taken of the partnership between her father and the defendants. The suit was dismissed as barred by limitation under Art. 106 of the Limitation Act. She then brought another suit against the same defendant, claiming as heir of her father and mother, and alleging that, on her father's death, the mother was admitted into the partnership; and she prayed for an account of both the partnerships:—

Held (1) that, so far as the partnership with the father was concerned, the claim was barred as *res judicata* by the decision in the previous suit,

(2) that the claim relating to the partnership between her mother and the defendants cannot be rejected as *res judicata*, unless it was shown that, during the previous suit, she was aware of the claim (a).

The word "might" in Explanation II to S. 13 of the Code, presupposes that the person defending or attacking in the former suit had knowledge of the matter at the time of that suit, and could have made it a ground of defence or attack therein (b) **Manikbal Jivaraj v. Virchand Ramchandra**, 9 Bom. L.R. 1020.

CHANDAVARKAR and HEATON, JJ.

References:—(a) 25 B. 1892 = 2 Bom. L.R. 872, F. (b) 11 M.L.A. at p. 73—15 I.A. 106 (112), Ref. to.

(17) S. 13—*Res judicata*—Explanation 2—Might and ought.

The defendant brought a suit for settlement of accounts against the plaintiff and obtained a decree. The plaintiff thereupon brought this suit for recovery of a sum of money, on the ground that the defendant had received it on his behalf in the years for which the defendant had brought the previous suit. Held that the plea might and ought to have been raised in the previous suit and the present suit was barred by the rule of *res judicata*. **Jagan Nath v. Balkishan**, 4 A.L.J. 675 = A.W.N. (1907) 275.

GRIFFIN, J.

(18) S. 13—*Res judicata*—Earlier suit in a subordinate Court—Subsequent suit in a superior Court but triable by subordinate Court—Different courses of appeal.

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

S. 13, Civil Procedure Code, cannot be so used as to bind the superior Courts by decision of inferior Courts, which were not, and could not have been, considered on the merits by the superior Courts; and a decision by an officer presiding in a Court passed in the exercise of a certain jurisdiction cannot be *res judicata* in a subsequent case, triable by that officer, but not triable in the exercise of the same jurisdiction, but under what might be called a superior jurisdiction.

Where an earlier suit was tried by a Subordinate Judge of the first class, which was also triable by a single Judge of the Chief Court, a subsequent suit before a single Judge of the Chief Court, on the same issue, which suit could be entertained by the Subordinate Judge also, would be barred by the earlier suit, although, the course of appeal would be different in the two cases. **Girdhar Lal v. Deoki Nandan**, 111 P. R. 1907.

JOHNSTONE and CHITTY, JJ.

References:—20 P. R. 1891 (F. B.), 27 P. R. 1879, 157 P. R. 1889 (F. B.), R.

(19) S. 13—*Res judicata between defendants.*

Where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, there must be such an adjudication, and, in such a case, the adjudication will be *res judicata* between the defendants as well as between the plaintiff and the defendants. But, for this effect to arise, there must be a conflict of interest amongst the defendants and a judgment defining the real rights and obligations of the defendants *inter se*. Without necessity, the judgment will not be *res judicata*. **Nga Thet Tha v. Mi Kye Gyi**, U.B.R. (1907), Civil Procedure, 5.

SHAW, J. C.

References:—11 B. 216, F; 18 A. 65, 15 M. 264, 22 A. 886, 25 B. 74, 8 C.W.N. 30, 26 M. 887, 6 C.D. 42, 3 Har's Rep. 627, 12 C. 580, R. (19-a) S. 13—See No. 14, *supra*.

(20) S. 13, Expl. II—*Res judicata—Pre-emption, right of.*

A Hindu widow sold a portion of her husband's estate alleging legal necessity. After the sale, the plaintiffs brought a suit against the purchasers, claiming a right of pre-emption, and the suit was dismissed, on the ground that no right of pre-emption was proved. In a subsequent suit brought after the widow's death, by the same plaintiffs, to set aside the aliena-

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

tion, on the ground that the estate of the husband now passed to them as next male heirs, and that the sale was not justified by legal necessity,

Held, that what was in question in the former suit was the right of pre-emption, in respect of what the widow had power to convey and did convey, that is, her widow's interest and that the introduction of any question, as to the effect of the conveyance upon the reversion, would have been incongruous to the matter of the suit, and, accordingly, the present suit was not barred by S. 13, Explanation II of the Civil Procedure Code. **The Deputy Commissioner of Kheri v. Khanjan Singh**, 5 C.L.J. 341 (P. C.)=11 C.W.N. 474=4 A.L.J. 232=2 M.L.T. 145=17 M.L.J. 238=9 Bom. L.R. 591=10 O.C. 117=29 A. 331.

LORD MACNAGHTEN, LORD ATKINSON, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

(21) S. 13, Expln. II, scope of—See **RES JUDICATA**, No. 19, 55 P.R. 1907.

(22) S. 13, Expl. II—See **RES JUDICATA**, No. 1, 107 P.R. 1906=76 P.L.R. 1907.

(23) S. 13, *Explns. 2 and 5, applicability of.*

In order to make S. 13 applicable, it is not necessary that the matter of the subsequent suit should have been heard or have been finally decided by a competent Court in the former suit, when the case is one to which Expln. 2 applies; otherwise, the Explanation would be meaningless. **Nga Chit Maung v. Nga Po Klu**, U.B.R. (1906), Civil Procedure, 46.

SHAW, J. C.

References:—24 C. 711, 20 A. 110, 24 A. 429, 16 I.A. 107 (P.C.), R.

(24) Ss. 13 and 21—Collector's decision under S. 13 of Madras Act III of 1895—Subsequent Civil suit—See ACT III OF 1895 (HEREDITARY VILLAGE OFFICES, MADRAS), No. 1, 30 M. 320.

(25) S. 13—*Indian Evidence Act (I of 1872), Ss. 13 and 43—Judgment not inter partes—Admissibility of the judgment in subsequent proceedings—Particular instances in which the right was claimed—Res judicata.*

The plaintiff, relying on a registered sale-deed passed to him by his father in 1885, sued to recover the possession of the property sold from his brother, brother's wife and the wife of a deceased brother. The plaintiff's father died in 1888 and the suit was brought in 1908.

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

In 1886, certain mortgagees had filed a suit against the plaintiff, his father and mother on a mortgage bond executed by the father. In that suit, the Court of first instance, as also the District Court, held the plaintiff's sale to be a sham transaction. The plaintiff at that time paid off the mortgage debt.

The defendants relied upon the judgment in suit of 1886, to show that the sale relied upon by the plaintiff was colourable.

Held, by Russell, Ag. C.J., (1) that the proceedings in the suit of 1886 should be admitted as relevant evidence in the present suit, for, the present plaintiff and the defendants, either by themselves, or their predecessors, were parties to the suit of 1886.

(2) that the judgment in the suit of 1886 would come within the purview of Cl. 2 of S. 13 of the Evidence Act, 1872.

Held, by BEAMAN J., (1) that a party, who has been allowed to put in a previous judgment not *inter partes*, for the purposes of S. 13 of the Indian Evidence Act, 1872, cannot be allowed to use its contents *qua* judgment, virtually thereby converting it into a *res judicata*.

(2) that, therefore, conceding that the judgment in suit of 1886 was admissible to prove that in 1886 there was a dispute about the genuineness of this sale-deed, it could not be used for any ulterior purpose. **Mahamed Amin v. Husam Mahamed**, 9 Bom. L.R. 65=31 B. 143.

RUSSELL, C. J. and BEAMAN, J.

References :—2 B.L.R. (P.C.), 111, 10 B. 439, 2 Bom. L.R. 386, 2 Bom. L.R. 651, 5 Bom. L.R. 290, R.

(26) *Ss. 13 and 43—Res judicata—Cause of action, splitting up of—Mortgage—Tender of amount—Mortgagee declining to accept, but remaining in possession of property—Relationship between mortgagor and mortgagee after refusal to accept money due—Suit for redemption—Second suit to recover mesne profits from the date of tender to the date of delivery of possession—Transfer of Property Act (IV of 1882), Ss. 62 and 83.*

The plaintiff passed a usufructuary mortgage in favour of the defendant in 1884 and placed him in possession. In 1901, the plaintiff tendered the amount of the principal to the defendant, but it was not accepted. The plaintiff then filed a suit, under S. 62 of the Transfer of

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

Property Act, to recover possession of the mortgaged property, and, at the same time, under S. 88 of the Act, deposited the amount of the principal in Court as the amount payable on the mortgage. The Court passed a decree for possession.

In 1904, the plaintiff filed another suit to recover mesne profits from the defendant from the date of the deposit to the date when he recovered possession of the mortgaged property in execution of the redemption decree in the first suit. The lower appellate Court disallowed the claim on the ground of *res judicata* :—

Held that the present claim was barred, either under S. 13 or 43 of the Civil Procedure Code; for, the profits derived by the mortgagee after a proper tender made or after the amount due had been deposited in Court, were profits for which he had to account to the mortgagor in virtue of a liability tacked on, so to say, by the statute to the mortgage contract, and, as such, a claim to them by the mortgagor was one arising from and connected with his right to redeem or recover possession of the property. It was all one cause of action which might and ought to be alleged by mortgagor in his suit to recover possession.

From the date of the tender or of the deposit, as the case may be, of the mortgage money by the mortgagor, the mortgagee who rejects the legal tender continues as mortgagee, but with a statutory liability to account for the profits received by him from that date. He is not then a mere trespasser, but a mortgagee still, holding the property as a kind of trustee for the mortgagor and as such accountable to the latter for the profits. **Rukhminibai Subraya v. Venkatesh Bab Prabhu**, 9 Bom. L.R. 958=31 B. 527.

CHANDAVARKAR and HEATON, JJ.

(27) *Ss. 13 and 43—Prior and puisne mortgage—Sale of mortgaged property—Redemption by vendee of the prior mortgage—Suit for sale by puisne mortgagee—Dismissal of suit on the ground that previous mortgage not offered to redeem. Second suit for redemption of prior mortgage and sale—Res Judicata—Transfer of Property Act (IV of 1882), S. 89.*

In August 1876 the owners of a village M mortgaged it to one G for Rs. 7,000 and put him in possession. In February 1884 the owners mortgaged M and other property to the plaintiff's father for Rs. 2,400 without

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

possession. In October 1891 the owners sold M to the defendant for Rs. 14,000, of which Rs. 7,000 was left with the purchaser in order to redeem the mortgage of 1876. Defendant redeemed the mortgage and obtained possession.

In August 1892 plaintiff sued for recovery of the amount due on his mortgage impleading the owners, the defendant and other persons describing them in the plaint as transferees of the mortgaged property, but he did not offer to redeem any mortgages. One of his prayers for relief was that the Court should make all orders that might be necessary to give him the main relief, i.e., sale of the property. The Court held that the plaintiff could redeem the village M, but he could not bring it to sale without first redeeming it. It therefore declared that the village was not saleable for plaintiff's money. A decree for the sale of other property was, however, passed in favour of the plaintiff.

The present suit was instituted by the plaintiff for redemption of the mortgage of 1876 and for the sale of M to recover the costs of redemption and the balance due at the date of suit on the former decree.

(*Per Chamier, A.J.C.*) *Held*, that the plaintiff's cause of action for the present suit was exactly the same as his cause of action for the former suit, viz., mortgage to him and non-payment of the mortgage money. In the former suit, he might and ought to have offered to redeem the prior mortgage. The Court, which decided the former suit, did not mean to decide that the suit was premature. The suit should therefore be dismissed as barred by Ss. 13 and 48, Civil Procedure Code (a).

(*Per Scott, J. C.*) *Held*, that the decision in the first suit was in fact that the suit was premature, and this decision being on a question of law was *res judicata* between the parties.

Held, further, that the words "ground of defence or attack" in S. 13, Civil Procedure Code, do not include a ground of defence or attack, which may come into existence by some act of the plaintiff, such as the payment of money to another. They refer to the condition of things at the time the former suit was instituted.

Held, also, that the suit was not barred by either S. 13 or 48, Civil Procedure Code (b).

(*Per Evans, A.J.C.*) *Held*, that the plaintiff was bound to sue for redemption of the prior mortgage in his first suit and ought to have made the offer to redeem a ground of attack.

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

He is, therefore, barred from bringing a fresh suit on the same cause of action.

Held, further, that the plaintiff having obtained a decree for sale on his mortgage and the decree for sale having been made absolute, the security had been extinguished under S. 89, Act IV of 1882, and the plaintiff had therefore no title to maintain the present suit (c). **Chaudhri Ganga Singh v. Lachmi Narain**, 10 O.C. 145.

SCOTT, CHAMIER, and EVANS, JJ.

References :—(a) 24 M. 491 (P.C.), R; (b) 1 O.C. 105, 8 O.C. 37, R; (c) 20 A. 110, 2 A. 429 (P.C.), R.

(28) Ss. 13, 244 and 331—Objection to execution by reversioner—Decree-holder directed to get a declaration against the reversioner—Reversioner brought upon the record as judgment-debtor—Former order, no bar—See HINDU LAW (WIDOW), No. 1, 4 A.L.J. 117.

(29) Ss. 13, 562, 578 and 584—*Res judicata*—*Judgment not operating as res judicata*—*Value as evidence*—*Second appeal*—*Evidence, disregard of*—*Finding of fact*—*Act. VIII of 1885 (Bengal Tenancy), S. 149*—*Onus*—*Suit for rents in deposit*—*Question of title*.

Where an order of remand by the lower appellate Court was not strictly in accordance with the provisions of S. 562 of the Code,

Held, that this amounted to an irregularity, such as was covered by the provisions of S. 578, of the Code (a).

Where, in a second appeal, the question was whether certain lands appertained to plaintiff's tenure,

Held, that a finding of the lower appellate Court thereon, which amounted merely to an expression of opinion, could not be accepted as a finding displacing the finding of the first Court, and, further, that the lower appellate Court had erred in law in disregarding certain evidence without giving sufficient reasons for rejecting it.

Where a suit was brought under the provisions of S. 149, cl. (3) of the Bengal Tenancy Act, and the plaintiff made out a very strong case in support of his title to the rents in deposit,

Held, that the onus was then shifted on the defendant, and that plaintiff was entitled to succeed, although he was not in a position to

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

prove realisation of rents from the tenant, the plaintiff's case being that the defendant had been preventing her from realising them.

Although the matter relating to the title of the plaintiff was not *res judicata* against the defendant, still the matter having been in issue in a suit, in which the defendant was a party, and that suit having been decided in favour of the plaintiff, and, in accordance with the decree passed in that suit, a conveyance having been executed in favour of the plaintiff's predecessor-in-title.

Held, that this constituted a strong case in favour of the plaintiff's title and possession, which it lay heavily on the defendants to displace. **Trailokya Mohinj Dasi v. Kali Pro-sanna Ghose**, 11 C.W.N. 380.

BRETT and SHARFUDDIN, JJ.

References :—(a) 5 C.W.N. 509=28 C. 324, F; 14 C. 537, 17 C. 829, 8 C.W.N. 248, R.

(30) S. 13—See *RES JUDICATA*.

(31) Ss. 16, 17, 19 and 57—*Return of plaint-Appeal*.

Where a plaint has been returned to the plaintiff to be presented to the proper Court, it is not open to him to appeal from the order of return, after he has taken back the plaint and refiled it in the Court directed. **Beni Madhub Das v. Jotendra Mohan Tagore**, 5 C.L.J. 580=11 C.W.N. 765.

MACLEAN, C.J., and FLETCHER, J.

(31-a) S. 17—See No. 31, *supra*.

(31-b) S. 19—See No. 31, *supra*.

(31-c) S. 21—See No. 21, *supra*.

(32) S. 24—*Application for transfer by decree-holder—Jurisdiction of Court—Application by judgment-debtor to be declared as insolvent*.

Held, that proceedings under Chap. XX of the Code of Civil Procedure are necessarily proceedings in execution of a decree and the judgment-debtor throughout such proceedings is in the position of a defendant.

Held, further, that the Court has no jurisdiction to pass an order for transfer under S. 24, Civil Procedure Code, on an application made by the judgment-creditor. **Rama Moni Dasi v. Nitya Gopal Sarkhel**, 10 O.C. 139.

CHAMIER and SANDERS, A.J.CS.

Reference :—22 B. 778, D.

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

(33) Ss. 25, 28, 492 and 493—*Injunction—Suit for—Temporary injunction—Appeal—Transfer of suit—Re-transfer*.

The plaintiff, a share-holder in a Brewery Company, Limited, sued in the District Court of Rawalpindi, three out of the four Directors of the Company, in their individual capacity and the Head Brewer, for an injunction to restrain the defendants from entering into certain transactions by way of purchase, or agreement to purchase, a certain business, or to invest money of the Company amounting to 2 or 3 lakhs of rupees in shares of the said business, when formed into a limited liability Company, and from disposing of the money or funds of the Company in pursuance of such transaction. A declaration that these transactions were *ultra vires* and not binding on the Company or its share-holders was also prayed for.

Pending the hearing of the suit, the counsel for the plaintiff obtained an *ad interim* injunction from Court to restrain the defendants from further proceeding in the matter.

The defendants appealed to the Chief Court against the grant of the temporary injunction.

On the date fixed for the hearing of the appeal, it was seemingly agreed to, by the counsel of the parties, on the suggestion of the Court, that the original suit should be transferred to the Chief Court, so that the motion for the temporary injunction should be treated as the hearing of the suit, and the matter could be decided once for all by the Chief Court.

The suit was accordingly transferred to the Chief Court. On the date of hearing of the case, the counsel did not agree to the hearing of the appeal and the suit together, as was suggested by Court; and the Court decided to deal with each separately, and in the ordinary course to dispose of in the first instance the appeal.

It was contended for the appellants that the order granting the temporary injunction was bad in law, for, (1) it was passed without any affidavits and without the Court satisfying itself as to the correctness or otherwise of the facts put forward in the plaint, (2) notice should have been issued to the appellants against the grant of the injunction, and (3) the Company not being made a party to the suit, and the three Directors of the Company being impleaded as defendants in their individual

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

capacity and not as Directors, the grant of injunction would be entirely futile.

Held the contentions were valid.

The appeal of the Head Brewer was granted on the ground that, in the capacity of a Head Brewer, he had, or could have had, nothing to do with the transactions in question.

The suit was re-transferred to the District Court of Rawalpindi; for, the object of its transfer to the Chief Court was not attained.

In the case of a suit for an injunction, it is practically impossible to grant a temporary injunction, without, to some extent, forming an opinion on the merits of the case, since it is the duty of the Judge to satisfy himself that the plaintiff has made out a *prima facie* case. **E. W. Parker v. Khan Bahadur Seth Dhanji Boy**, 58 P.L.R. 1907.

CHITTY and RATTIGAN, JJ.

(34) *Ss. 25 and 562—Jurisdiction, question of, if may be taken for the first time in appeal—Re-transfer of case withdrawn by District Judge after remand—Code, if exhaustive—Court, inherent powers of—Court, duty of, to set right wrong done to suitor—Jurisdiction, what constitutes—Jurisdiction, waiver of, by consent or conduct.*

An objection that a Court has no jurisdiction to adjudicate upon a matter, raises a question of jurisdiction, and, as such, it may be allowed to be taken for the first time in appeal, although it was not suggested at any earlier stage of the proceedings.

When once a District Judge withdraws a suit to his own file for trial, he is not competent, under S. 25 of the Code of Civil Procedure, to re-transfer it to the Court from which the case had been withdrawn, but, he has inherent power to do so, when the interests of justice require it (a).

Quære: Whether S. 25 of the Code of Civil Procedure has application to a case remanded under S. 562 of the Code (b).

The Code of Civil Procedure was not intended to be, and is not, exhaustive (c).

The Courts in this country have, in matters of procedure, powers beyond those which are expressly given by the Code of Civil Procedure, which binds Courts only in so far as it goes; the powers of the Court are not rigidly circumscribed by the provisions of the Code, and the Court has inherent power to make a particular

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

order, which is essential in the interests of justice, even where no section of the Code can be pointed out as a direct authority for it, when its decision is based on sound general principles and is not in conflict with them, or the intention of the Legislature (d).

To proceed to recall and cancel an invalid order is not simply permitted to, but it is the duty of, a Judge who should always be vigilant not to allow the act of the Court itself to do wrong to the suitor (e).

Jurisdiction is the power of a Court to hear and determine a cause, to adjudicate or exercise any judicial power in relation thereto (f).

It is only when a Judge or Court has no jurisdiction over the subject-matter of the proceeding or action in which an order is made or a judgment rendered, that such order or judgment is wholly void, and that the maxim applies that consent cannot give jurisdiction; in all other cases, the objection to the exercise of the jurisdiction may be waived, and is waived, when not taken at the time the exercise of the jurisdiction is first claimed (g). **Gurdeo Singh v. Chandrikah Singh, and Chandrikah Singh v. Rash Behary Singh**, 5 C.L.J. 611.

MOOKERJEE and HOLMWOOD, JJ.

References:—(a) 10 C.W.N. 902, 13 B. 654, 24 A. 304, 24 A. 356, R. (b) 21 A. 280, R. (c) 3 C.L.J. 29, 3 C.L.J. 67=33 C. 957, R. (d) 4 C.L.J. 306=33 C. 1094, R. 32 C. 875. *explained and distgd.* (e) 14 M.I.A. 40, 2 C.L.J. 306, R. (f) 2 C.L.J. 241=33 C. 68 and 12 Peters 657, R. (g) 13 I.A. 134=9 A. 191; 14 I.A. 160=11 M. 26; 2 C.L.J. 259=33 C. 352; 19 Atlantic Rep. 898; L.R. 5 P.C. 516; 12 Q.B.D. 984; 12 Q.B.D. 497; 11 B. 153; 2 C.L.J. 384=9 C.W.N. 956; 98 U.S. 476; 12 Peters 300; 5 Duer. N.Y. 672, R.

(35) *Ss. 26 and 53—Suit for libel—Misjoinder of plaintiffs and causes of action—Cause of action, meaning of—Six plaintiffs in libel suit, if suit to be dismissed.*

Six members of the Police force jointly sued to recover Rs. 20,000 for alleged libel by the defendants.

Held, that the suit was bad for misjoinder of plaintiffs and causes of action (a).

The Court, however, instead of dismissing the suit, directed the plaintiffs to elect, if so advised, as to which one of them should proceed with the suit and that, after such election, the plaint be amended by striking out the other

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

plaintiffs and making other consequential alterations. **S. C. Aldridge v. A. S. Barrow**, 11 C.W.N. 680 = 34 C. 662.

CHITTY, J.

References :—(a) 22 C. 833, L.R.A.C. 494, (1895) A.C. 661, 11 C. 524, 26 B. 259, 1 Q.B. 711, R ; 2 Q. B. D. 496, *explained and distinguished*.

(36) *S. 27—Suit by plaintiff having no right to sue—Substitution of right person.*

The words of the section "if the suit is brought in the name of a wrong person as plaintiff" cannot be construed as excluding altogether persons who may institute the suit without any right to do so.

Where a suit is instituted by a person having no right to institute it, in the *bona fide* belief that he is entitled to do so, the Court has power under S. 27 to substitute the right person as plaintiff (a). **Krishna Boi v. The Collector and Government Agent, Tanjore**, 30 M. 419 = 2 M.L.T. 447.

BENSON and MILLER, JJ.

Reference :—(a) 6 C. 370, R.

(37) *S. 27—Suit by managing members of a joint Hindu family firm—Non-joinder of other members—Refusal of application to be joined as plaintiffs, whether justifiable—Limitation.*

In a suit by the managing members of a joint Hindu family firm, for a debt due to the firm, the defendants contended that the suit was not maintainable, as the other members of the family, several of them minors, were not joined as plaintiffs. The plaintiffs at once admitted the fact, and the other members of the family applied to be joined as plaintiffs. The lower Court refused the application. *Held*, by the Chief Court on appeal, that the omission of the names of the other members of the family was due to a *bona fide* mistake, in the belief, that such addition was not necessary, and that, under S. 27 of the Civ. Pro. Code, the remaining members of the family should be added as plaintiffs (a).

Where persons are added as plaintiffs, under S. 27 of the Code, the period of limitation counts from the date when the suit was originally instituted (a). **Behari Lal v. Ram Chand**, 149 P.R. 1907.

ROBERTSON and LAL CHAND, JJ.

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

References :—(a) 17 B. 413, F ; 28 B. 11, 15 B. 397, 7 A. 284, 57 P.R. 1905, 29 P.R. 1896, 69 P.R. 1906, 79 P.R. 1906, 86 P.R. 1891, 17 C. 160, 6 C. 815, 33 C. 657, R. (b) 15 C. 400, 17 B. 413, R.

(38) *S. 28—Misjoinder of parties and causes of action—Relief asked common to the defendants joined—Practice.*

The plaintiff owned a godown in Bombay. He agreed with Messrs. Khimji Vishram (defendants Nos. 1—6) to let the godown from 1st May, 1906, for a fixed term of 12 months. At the date of the agreement, the godown was in the occupation of Messrs. Nensy Khairaz & Co. (defendants Nos. 7 and 8). The plaintiff sued the two sets of defendants to recover from either the one or the other set a sum of money for rent of his godown. Messrs. Khimji Vishram alleged that they did not get possession of the premises in terms of the agreement, that they obtained possession of only one compartment out of three on the 22nd May, 1906, in consequence of which they had to hire other premises. The second set of defendants, Messrs. Nensy Khairaz & Co., contended that there was an oral agreement with the plaintiff that they should occupy the godown till the end of May, 1906, that they gave up possession of a portion of the godown before the 22nd May, 1906, and, on the 22nd May, 1906, they gave up possession of the remaining portion to the plaintiff and the first set of defendants, Messrs. Khimji Vishram & Co. It was objected to this suit that it was bad by reason of misjoinder of parties and of causes of action :—

Held, disallowing the objection, that the subject-matter, in respect of which the plaintiff sought relief against both sets of defendants, was rent of his godown, it was the same matter as regards both sets of defendants, and both sets of defendants were interested in the adjudication of the questions involved in the suit, and there were many questions of fact, which were common to the case of both sets of defendants.

The object of S. 28 of the Civil Procedure Code is to avoid multiplicity of suits, if it could be done without embarrassment to any of the defendants.

The general principle governing the joinder of defendants would seem to be that there must be a cause of action, in which all the defendants are *more or less* interested, although the relief asked against them may vary, but that separate

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

causes of action against separate defendants, quite unconnected and not involving any common question of law or fact, cannot safely be joined in one action. **Mavji Manji v. Kuverji Narraoji**, 9 Bom. L. R. 482=81 B. 516.

DAVAR, J.

(38-a) S. 28—See No. 38, *supra*.

(39) S. 30—*Unregistered religious society—suit in the name of one member described as manager maintainable—Other members, whether necessary parties—Pre-emption—Owner of a plot of grove land not assessed to revenue, whether a co-sharer.*

The Mahant of an *akhara* brought a suit for pre-emption on behalf of the *akhara*, after obtaining permission under S. 30, Civ. Pro. Code. Held, that the suit could be maintained in the name of the Mahant, and it was not necessary to join all the members of the *akhara* as parties.

The owner of a plot of grove land, not assessed to revenue, is not a co-sharer and cannot resist a suit for pre-emption instituted by a co-sharer (a). **Atmanand v. Brahm Narain**, 4 A.L.J. 541=A.W.N. (1907), 239.

GRIMFIN J.

Reference :—(a) 2 A.L.J. 612, D.

(40) S. 32—Addition of party by Court after period of limitation—Effect—See LIMITATION ACT, No. 37, 11 C.W.N. 350.

(41) Ss. 32 and 588 (b)—Court's power to strike out name of co-defendant after first hearing—Appeal.

Under S. 32, a Court is not competent to strike out a co-defendant's name after the first hearing of a suit. An appeal lies under S. 588 (b) from the Court's order returning the plaint for amendment in this particular after the first hearing. **Fateh Ali v. Nizam Din**, 71 P.R. 1907.

RATTIGAN, J.

References :—7 A. 79 (F.B.), F. 1 P.R. 1900 ; 14 B. 232 ; 1 P.R. 1903, R.

(42) Ss. 37 and 578—Authority of agent to file a suit—Punjab Chief Court rules and orders framed under the section—Recognised Agents—Parties not residing within jurisdiction.

A defendant is entitled to question the authority of an agent to file a suit on behalf of his principals, as, if the authority is defective, he is liable to be sued afresh at the instance of the principals (a).

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

A defect of this kind cannot be cured, as a mere irregularity under S. 578 of the Code, for the foundation of a suit is a valid plaint, and, if there be no valid plaint, the Court has no jurisdiction and there is no case to be tried by it and the suit must be dismissed (b).

An agent carrying on business at Lyallpur, in the name of the partners of a firm resident in England, was held not to be a recognised agent, under clause (c) of the Rules and Orders of the Chief Court, Punjab, made under S. 37 of the Civ. Pro. Code, corresponding to clause (c) of S. 37, partly because it was not really he, but Karachi agents, who carried on the trade and business of the plaintiffs, and partly because there were other agents expressly authorised in matters of filing suits. Nor was he an agent under clause (d), as according to the facts of the case, he was authorised not by the parties themselves, but only agents of such parties.

It is impossible to say that "agent expressly authorised," referred to in clause (c) of the rules applicable to the Punjab, necessarily means an agent actually present in the locality where the contracts are made or carried out. **Fateh Din v. Ralli**, 109 P.R. 1907.

JOHNSTONE and HURRY, JJ.

References :—(a) 19 C. 678, R. (b) A. W. N (1899), 55 ; A.W.N. (1891), 152, R.

(43) S. 43—Eviction by person with paramount title—Suit for damages for breach of covenant for quiet enjoyment.

Where a lessee has been evicted once and for all by the Malguzar, who has a title paramount to that of the lessor, the lessee can bring only one suit for damages for the breach of the covenant for quiet enjoyment. If he sues for damages representing the mesne profits of some years, he is barred by S. 43 of the Code from subsequently suing again for mesne profits for subsequent years. The case of an eviction by a person with paramount title differs from other breaches of the covenant for quiet enjoyment, upon which damages may be recovered from time to time as they accrue. **Tukaram Koshti v. Lalsa Prannath**, 3 N.L.R. 80.

BATTEN, J. C.

Reference :—21 B. 175, F.

(44) S. 43—Fee for medical attendance—Part paid by writing a promissory note—Suit on promissory note—Second suit for balance barred.

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

P, a medical man, was engaged by R, defendant's father, on Rs. 100 per day. For a portion of the fee, R executed a promissory-note, and the balance was agreed to be set off against R's fee for conducting a case of P in a Civil Court. After R's death, P sued the defendant on the promissory-note and got a decree. He then brought this suit for recovery of the balance, which was to be set off, and also a further sum for subsequent attendance, on the ground that, R having died, he (R) could not perform his part of the contract. *Held*, that the suit was barred by the provisions of S. 43. The causes of action of the two suits were in reality the same, that is, the breach of the agreement to pay Rs. 100 *per diem*, and the fact that a promissory-note was given, in satisfaction of part of the debt, did not take the case out of S. 43. When the plaintiff brought his first suit, R was dead, and he could fall back upon the original agreement. But the suit for fees for subsequent attendance was not barred. **Preo Nath Mukerji v. Bishyanath Prasad**, 4 A.L.J. 85=A.W.N. (1907), 41=29 A. 256.

STANLEY, C.J., and BURKITT, J.

- (45) S. 43—*Several breaches of covenants made under one contract—Maintainability of separate suit for each breach—Cause of action.*

When principal and interest are both due under a mortgage bond, S. 43 says there can only be one suit for both. This cannot be overridden by an agreement between the debtor and the creditor that separate suits might be brought. Where there are several breaches of covenants made under one contract, one way of looking at the matter is that, at the date of the latter breach, the right of action based on the earlier breach, if it is not barred by limitation, is merged in that arising out of the latter breach. All the covenants to be performed under any contract, before the suit is brought, are to be treated as joined and merged into one by the contract, and the breach of all the covenants enforceable before that time, deemed as one breach. **Ganga Ram v. Abdul Rahman**, 28 P.R. 1907.

CHATTERJI and RATTIGAN, JJ.

References:—8 C. P. 107, 22 Q.B.D. 128, 15 I.A. 156, 22 C. 889; 16 A. 165, 25 A. 48, 6 C.W. N. 585, 17 P.R. 1897, 128 P.R. 1881, 129 P.R. 1889, 21 B. 267, 18 M. 257, 11 M. 210, 24 M. 481, 27 M. 116, 12 C. 889, 19 C. 372, 12 A. 203, 15 I. A. 66, 5 B. 181, 7 Q.B.D. 493, R.

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

- (46) S. 43—*suit for possession against a lessee dismissed as non-maintainable—Subsequent suit for declaration—Cause of action, remedies with respect to one—Claim as to one remedy.*

The defendant took a lease of certain lands from the lambardar of the mahal. On partition, the land in dispute fell into the plaintiff's share. He sued the defendant for possession of the land, treating him as a trespasser. It was held that the defendant was a tenant, and no suit for possession could be brought against him. The plaintiff's prayer to get declaratory relief alone was rejected by the Court, as having been advanced at a very late stage of the case in second appeal. The plaintiff then brought the present suit for a declaration as to his title to the lands in dispute.

Held, that the latter suit was barred under the provisions of S. 43 of the Code, inasmuch as, where a plaintiff claims a remedy, to which he is not entitled, in respect of a certain cause of action, and does not claim a remedy, to which he is entitled, he cannot claim the latter in a subsequent suit founded on the same cause of action. **Badri Bisal v. Musammat Lalta Kor**, 10 O.C. 44.

SCOTT and CHAMBER, J.CS.

References:—5 O.C. 178, 8 O.C. 889, 24 M. 491, F. 3 A. 857, 14 B. 31, 8 C. 819, R.

- (46-a) S. 43—See Nos. 26 and 27, *supra*.

- (47) Ss. 43 and 44—*Reliefs for declaration and damages arising out of one cause of action are one claim—Relief and cause of action distinguished.*

B got a declaratory decree to build a drain on a piece of land, which C and D claimed as their own and offered to allow B to build upon it, if he would pay its price. After obtaining the declaratory decree, B brought another suit for damages caused to him by C's and D's refusal.

Held, that S. 43 of the Code of Civil Procedure barred the claim for damages inasmuch as there was only one act and one cause of action giving rise to more than one relief which B ought to have joined in the first suit:

Held, also, that under S. 44 of the C.P. Code, there is no bar to separate reliefs arising from the same cause of action being claimed in the same suit (a). **Banaraidas v. Municipal Committee, Delhi**, 5 P.W.R. 1907=28 P.L.R. 1907.

ROBERTSON, J.

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

References—(a) 10 M. 375 and 506; 23 B. 379; 190 P.R. 1898, *F.* 24 A. 553, 129 P.R. 1889; 78 P.R. 1902 and 87 P.R. 1903, *Dist.*

(48) *Ss. 43, 411, 212 and 244—Suit for mesne profits.*

Mesne profits up to date of suit which can be claimed in the suit for possession of immovable property, are profits, which were actually received by the person in wrongful possession, or might, with ordinary diligence, have been received before that date. **Nga Lu Pe v. Nga Shwe Yun**, U.B.R. (1906), Civil procedure, 50.

SHAW, J.C.

Reference :—U.B.R. (1904-05), Civil procedure, 1, *Diss.*

(49) *S. 44—Suit by plaintiffs representing a community for declaration of title to a temple—Personal claim for damages—Misjoinder.*

A suit by the plaintiffs, on behalf of a community, for a declaration of their rights to the plaint temple, together with a personal claim for damages on account of obstruction, slander, and injury to property on a particular occasion, must be regarded as one to obtain a declaration of title to immovable property and to recover damages, and, as such, contravenes the provisions of S. 44, Civ. Pro. Code, even granting the cause of action to be the same. The observation of the Privy Council in 31 I.A. 10, must be limited to cases where a party sets up the same title to moveable and immovable property, and it was not intended to apply to a case like the present, where a party claims a declaration of title and, in the same suit, sets up a claim for damages for tort. **Kathan v. Sadayan**, 17 M.L.J. 135.

WHITE, C.J., and BENSON, J.

Reference :—(a) 31 I.A. 10, *D.*

(49-a) *S. 44—See No. 47, supra.*

(50) *S. 44, rule (b)—Executors, administrators and heirs as such—Legatees and next-of-kin, points of difference between—Misjoinder of causes of action.*

Those, to whom rule (b) of S. 44 of the Code relates, have the common characteristic that they owe their legal condition to the death of another. But there are others of whom this can be predicated, as for instance, legatees or next-of-kin, and yet they are not named in rule (b). But the common characteristic of executors, administrators and heirs, which is not shared

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

by legatees and next-of-kin, is that the former not only acquire title from the deceased but they may represent him. In this is to be found the clue to the meaning of the rule.

Thus, a claim may be made by, or against, the heir of a deceased Hindu as his representative, and again the same person may claim for his own benefit and in his own personal right property of which the beneficial ownership has devolved on him by inheritance from, that is to say as heir to, this deceased Hindu. His legal capacity in the two cases is absolutely distinct, and it is only in reference to his representative capacity that it can be said a claim has been made by or against an heir as such (a). **Hafizaboo v. Mahomed Casam Moorad**, 8 Bom. L.R. 734 = 31 B. 105.

JENKINS, C.J., and BEAMAN, J.

Reference :—(a) 6 B. 390, *disapproved.*

(51) *S. 45—Joinder of defendants—Possession under separate deeds—One cause of action.*

Where property is transferred, under separate deeds, at different times, to different transferees, and the plaintiff brings one suit for possession against all the transferees, held that the suit is not bad for multifariousness. In a suit for ejectment against several defendants, who set up various titles to different parts of the land claimed, there is only one cause of action, and not several distinct and separate causes of action (a) **Parbati Kuar v. Mahmood Fatima**, 4 A.L.J. 121 = A.W.N. (1907), 36 = 29 A. 267.

STANLEY, C.J., and BURKITT, J.

References :—(a) 16 A. 279, *Dist.* 21 C. 831 and 29 C. 871, *F.*

(52) *S. 45, application of, to N.-W.P. Tenancy Act—Suit for rent—Separate holdings—Joint suit not maintainable.*

S. 45 of the Code does not apply to suits for rent. A landlord cannot bring a joint suit for rent of several holdings, both occupancy and non-occupancy. The N.W.P. Tenancy Act contemplates separate suit for arrears of rent, in respect of separate holdings. **Jagannath Prasad v. Tore**, 3 A.L.J. 610 = A.W.N. (1906), 253 = 29 A. 18.

BANERJI and RICHARDS, JJ.

(53) *S. 45—Mortgage suit—Multifariousness—Misjoinder of parties and causes of action.*

Three of the four mortgages held by the plaintiff were binding on defendants Nos. 1 to

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

10, members of a joint Hindu family. The fourth mortgage was by the second defendant in respect of his share of certain items of joint family property and was binding on his son, the ninth defendant. The eleventh and twelfth defendants were joined, as they were subsequent and prior mortgagees of certain items.

Held that the suit was not bad on account of multifariousness. **Parthasarathy Naicken v. Thandavaraya Mudaliar**, 17 M.L.J. 515.

BENSON and WALLIS, JJ.

Reference :—25 M. 108 (113), *R.*

(54) Ss. 48 and 54—Presentation of insufficiently stamped plaint—Making up of stamp duty subsequent to the period of limitation for the suit—Validity—See LIMITATION ACT, No. 1, 123 P.R. 1907 = 82 P.W.R. 1907.

(55) S. 50—Bar of limitation—Plea of exemption under S. 14 of the Limitation Act—Not alleged in plaint—Whether allowable in appeal—See LIMITATION ACT, No. 28, 17 M.L.J. 281.

(56) S. 53, proviso—Amendment of plaint—Alteration of nature of suit.

The plaintiff originally claimed a share in two houses as heir to his wife ; but subsequently he applied for and obtained leave to amend his plaint, so as to claim the whole of the two houses as his own property, the houses having originally been purchased by the plaintiff in the name of his wife. *Held* that this amendment was not obnoxious to the prohibition contained in the proviso to section 53 of the Code. **Mian Jan v. Abdul**, A.W.N. (1907), 203.

BANERJI and AIKMAN, JJ.

Reference :—25 C. 371, *R.*

(56-a) S. 53—See No. 35, *supra*.

(57) S. 54—Rejection of plaint—Procedure—Plaint not to be rejected in part.

Under S. 54 of the Code, a Court cannot reject a plaint in part. **Raghubans Puri v. Jyotiss Swarupa**, A.W.N. (1907), 68 = 29 A. 325.

STANLEY, C.J., and BURKITT, J.

(57-a) S. 54—See No. 54, *supra*.

(58) S. 54, Cl. (b)—Plaint, admission, registration and rejection of.

It is competent to a Court to reject a plaint under S. 54, Cl. (b) of the Civ. Pro. Code, after it has been admitted and duly registered.

Civ. Pro. Code (Act XIV of 1882).—(Contd.)

A plaint was presented on the 23rd June, 1902, insufficiently stamped. The plaintiffs were directed by the Court to pay the deficit Court fees on or before the 5th July ; the Court fees were supplied on the 9th July. No prayer was made for extension of time, nor was an order made in that behalf ; but the plaint was directed to be admitted and registered. At the final hearing, the plaint was rejected upon objection taken by the defendant that the deficit Court fees had not been paid within the time allowed.

Held, that, under the circumstances of this case, the plaint ought not to have been rejected, but the Court ought to have proceeded with the suit, as if it had been instituted on the date the deficit Court fees were actually paid, dismissing such portion of the claim, if any, as might, in this view, be barred by limitation. **Pudmanand Singh v. Anant Lal Misser**, 4 C.L.J. 421 (F.B.) = 11 C.W.N. 38 = 1 M.L.T. 355 = 34 C. 20.

MACLEAN, C.J., and GHOSE, RAMPINI, GEIDT and HOLMWOOD, JJ.

(59) S. 54—Rejection of plaint for improper valuation—See COURT FEES ACT, No. 4, 11 C.W.N. 705.

(59-a) S. 57—See No. 31, *supra*.

(60) S. 59—Documents not mentioned in the plaint—Inspection by defendant before filing written statement—Practice.

It has heretofore been the practice, not to order the plaintiff to give inspection of documents, other than those relied on in the plaint and included in the list of documents annexed to the plaint, as required by S. 59 of the Code, till after the written statement is filed.

This is not, however, an inflexible rule in all cases. There may be cases, where it would be imperative to order the plaintiff to produce and give inspection to the defendant of a document, which he may not have mentioned in the plaint, or enumerated in the list of documents annexed thereto. **Khetaldas v. Narotum Das**, 9 Bom. L.R. 1084.

DAVAR, J.

(61) S. 102—Order dismissing suit in default—Not decree—Not appealable—See APPEAL (GENERAL), No. 3, 51 P.W.R. 1907 = 21 P.R. 1907.

(61-a) S. 102—See No. 3, *supra*.

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

(62) *Ss. 102 and 103—Suit for redemption dismissed for default—Fresh suit for the same barred.*

If a mortgagor sues for redemption and his suit is dismissed under S. 102, Civ. Pro. Code, and he, thereafter, brings a fresh suit for redemption of the same mortgage, the cause of action in the second suit is the same as the cause of action in the first and is barred by S. 103 of the Civ. Pro. Code. **Gurditta v. Narain Das**, 43 P.R. 1907.

RATTIGAN, J.

*References:—*15 C. 422 (P.C.), 117 P.R. 1891 and 32 P.R. 1905, *F*; 10 B. 28, *D*; 25 M. 90 (F.B.), 7 B. 467, 13 B. 567, 19 A. 202, *Appr.*; 86 P.R. 1877, 14 P.R. 1881, 6 M. 119, 7 M. 432, 11 A. 386 and 15 M. 366, *doubted*.

(63) *Ss. 102, 103, 157 and 158—Adjourned hearing—Default—Dismissal—Restoration.*

A, the plaintiff in a suit, took out processes against his witnesses; they did not, however, though served, appear on the adjourned date fixed for trial. The pleader for the plaintiff prayed for the issue of a warrant for the arrest of one of them. This was refused. The pleader then intimated that he had no further instructions to appear in the suit which was thereupon dismissed.

Held, that the dismissal was not under S. 158 of the Code, but was under S. 157 read with S. 103 of the Code. It was, therefore, competent to the plaintiff to apply under S. 103 of the Code, to have the order of dismissal set aside.

Scope of Ss. 157 and 158 of the Code, explained. If there are no materials on the record at an adjourned date of hearing the Court ought to proceed under S. 157 of the Code. If, however, there are materials, the Court ought to proceed under S. 158 of the Code. **Marian alias Doman Bibi v. Ramkalpa Gorain**, 5 O.L.J. 230 = 34 C. 235.

MOCKEYER and HOLMWOOD, JJ.

(64) *S. 103—Reference to Civil Court for apportionment of compensation—Dismissal for default—Restoration—Sufficient cause—See Act I of 1894 (Land Acquisition), No. 35, 11 C.W.N. 430.*

(64-a) *S. 103—See Nos. 62 and 63, supra.*

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

(65) *Ss. 103, 157—High Court's power to interfere with order of restoration—Lower Court's discretion—Sufficient cause.*

An appellate or revisional authority ought not, generally, to interfere in a case, when the Court, before which a suit has been instituted and has been dismissed without being tried, is of opinion that the case ought to be tried. A generous construction should be placed on the enactment, which gives the power to restore. The general policy of the Legislature, in a matter of this sort, is shown by the fact that a right of appeal is given against an order refusing to restore, but no right of appeal is given against an order of restoration. As to the question of sufficient cause, a Court of revision ought not lightly to interfere with the discretion exercised by the lower Court. **Gopal Row v. Maria Soosaiya Pillai**, 17 M.L.J. 225 = 30 M. 274.

WHITE, C.J., and BENSON, J.

*Reference:—*26 M. 599, *R*.

(66) *Ss. 103, 310 and 588 (8)—Appeal—Order refusing to restore on application under S. 310 which had been dismissed for default of appearance.*

Held that no appeal lies from an order refusing to restore to the file of pending applications an application under S. 310 of the Code of Civil Procedure, which had been dismissed for default of appearance. **Ghasiti Bibi v. Abdul Samad**, A.W.N. (1907), 186 = 29 A. 596.

BANERJI, J.

*Reference:—*31 C. 207, 10 B. 433, 11 M. 319, *F*.

(67) *Ss. 103 and 647—Application for revision—Dismissal for default—Power of Court to restore the application.*

Where an application for revision is dismissed for default of the petitioner, such petition can be restored by the Court under S. 103, C.P.C., by virtue of the provisions of S. 647 of the Code (a). **Jiwani v. Bhagel Singh**, 97 P.R. 1907.

CHATTERJI and JOHNSTONE, JJ.

References:—(a) 109 P.R. 1882, *Diss.* 70 P.R. 1908; 75 P.R. 1881; 54 P.R. 1901 (F.B.); 14 C. 177; 62 P.R. 1894, *R* and *D*.

(68) *Ss. 103 and 108—Ex parte decree, order sitting in—Order obtained by one defendant, if errors to the benefit of all—Decree,*

Civ. Pro. Code (Act XIV of 1892).—(Contd.).

if whole, set aside—Principles governing such cases.

S. 108 of the Civ. Pro. Code must be read with S. 106, and effect should be given to all the provisions contained in them.

It cannot be laid down as an inflexible rule of law, that, whenever an order is made under S. 108 of the Code, the effect is to set aside the whole decree, although it may have been made against some of the defendants after a contest, or although an unsuccessful effort may have been made by some of the defendants to set aside the *ex parte* decree. It is not obligatory upon the Court to set aside the whole decree and to re-open the entire suit under all circumstances (a).

Principles, which should be applied in determining whether the entire decree is to be set aside or whether it should be set aside only in so far as it affects the applicant, discussed and explained. **Jadubansa Narain v. Mohunt Hari Charan Bharati**, 6 C.L.J. 226.

MOOKERJEE and HOLMWOOD, JJ.

References:—(a) 4 C.W.N. 456, 8 W.R. 260, R; 25 C. 155, *Expl* and D.

(69) S. 108—*Ex parte decree set aside at the instance of some of several defendants—Effect—Revival of the whole case.*

Where the question involved in a case is whether the liability of the defendants is joint or several, and, in such case, the *ex parte* decree is set aside, on the application of some of several defendants, the entire decree is set aside, and the trial *de novo* ought to be a trial of the whole case, in the presence of all the parties. *In re Hari Das Karmakar*, 5 C.L.J. 202.

PRATT and GEIDT, JJ.

References:—6 C.W.N. 109, D., 25 C. 155, F.

(70) S. 108—*Suit to set aside decree—Decree ex parte—Only fraud, non-service of summons—Application to set aside ex parte decree dismissed—Suit not maintainable.*

Where the plaintiff claimed to set aside a decree, on the ground of fraud, and the only fraud alleged was the non-service of summons, and the plaintiff had previously unsuccessfully applied to set aside the *ex parte* decree under S. 108 of the Code, held that the suit was not maintainable (a). **Puran Chand v. Sheo Dat Rai**, 4 A. L. J. 51 = A. W. N. (1907), 31 = 29 A. 212.

KNOX and RICHARDS, JJ.

Civ. Pro. Code (Act XIV of 1892).—(Contd.).

References:—(a) 28 C. 475 and 29 C. 395, distinguished.

(71) S. 108—*Decree ex parte—Application to set aside decree—Right of representative to continue proceedings initiated by defendant.*

Where proceedings under S. 108 of the Code of Civil Procedure have been initiated by the defendant, the legal representative of the defendant is entitled to continue such proceedings. **Beti Jee v. Sham Bihari Lal, A.W.N.** (1907), 176 = 4 A.L.J. 480 = 29 A. 574.

KNOX, C.J., and RICHARDS, J.

References:—21 A. 274, D; 29 C. 38, R.

(72) S. 108—*Ex parte decree against more defendants than one—Execution against some of the defendants—Application by other defendants to set aside ex parte decree—Limitation—See LIMITATION ACT, No. 118, 9 Bom. L.R. 323 = 31 B. 308.*

(72-a) S. 108—See No. 68, *supra*, and No. 97, *infra*.

(73) Ss. 108 and 158—*Restoration of ex parte decree after setting it aside.*

A Court cannot, after having set aside an *ex parte* decree, proceed to uphold that decree, as if it was still existing. The Court should, if it was acting under S. 158, proceed to decide the suit, as it then stood before it, if it could do so. **K. V. R. M. M. Raman Chettiar v. Meer Kari Mohideen Sahib**, 17 M.L.J. 81.

MILLER, J.

(74) Ss. 108, 244, 311 and 578—*Suit to set aside sale held in execution of rent decree, if maintainable—Rent decree ex parte, fraudulent—Sale, collusive—Suit, if, may be treated as an application under S. 244—Limitation Act (XV of 1877), Sch. II, Art. 178—Time from which limitation runs—Purchaser, remedy of—Demand, order of, if proper, when original suit not decided on a preliminary point—Prejudice.*

An execution sale may be challenged on the ground of fraud in the execution proceedings; it may also be challenged on the ground that the decree, on which the proceedings are founded, is itself tainted with fraud. In the former case, the remedy of the person affected, is by an application under S. 244 of the Code of Civil Procedure. In the latter case, the remedy is by a regular suit (a).

If the decree is tainted with fraud, a suit lie to will set aside the execution sale, even

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

though the decree may have been previously set aside under S. 108 of the Code of Civil Procedure, and there is no subsisting decree to be set aside in the suit, in which the sale is impeached (b).

Cases can only be enquired into under S. 244, Civil Procedure Code, when the existence of a decree, which is susceptible and capable of execution, is conceded, and it does not apply to a case, when the object is to impugn the decree itself (c).

If there was fraud in the execution proceedings, it would be open to the party affected by the fraud, to make an application under S. 244, Civil Procedure Code; if, instead of an application, he presents a plaint in the Court competent to deal with the matter, the defect is one of form rather than of substance, and there is no real want of jurisdiction (d).

The application to have the sale set aside under S. 244, Civil Procedure Code, may be made within 3 years from the date of the sale, under Art. 178 of the Sch. II of the Limitation Act (e).

S. 578 of the Civil Procedure Code cures the defect in an irregular order of remand made by an appellate Court, unless the merits of the case are shown to have been affected in any way by the order (f). **Debendra Nath Bhattacharjee v. Prasanna Kumar Chakravarti**, 5 C.L.J. 328.

MOOKERJEE and HOLMWOOD, JJ.

References:—(a) 19 C. 683; 21 C. 605; 3 C. W.N. 395, R. (b) 27 C. 197, R. (c) 31 C. 179 and 4 C.L.J. 475, R. (d) 19 W.R. 90, 14 C. 605, 22 C. 483, 3 C.W.N. 395, 18 A. 106, R. (e) 2 C.W.N. 691, 26 C. 324, R. (f) 5 C.L.J. 71, R.

(75) **Ss. 108, 522 and 560**—*Appeal by some defendants—Ex parte defendant—Application to set aside ex parte decree—Court having power to entertain such application—Limitation Act, Arts. 164 and 169—Scope of.*

Where, after an appeal by some of the defendants from a judgment of the lower Court was dismissed, a defendant, who was *ex parte* of the lower Court, seeking to set aside the decree, under S. 108 of the Code, on the ground that he was never served with notice, should apply to the appellate Court, under S. 522 of the Code (a).

The power to pass an order, under S. 108, is distinct from the power to set aside an *ex parte*

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

appellate decree conferred by S. 560, which only enables the Court to direct the appeal from the original decree to be reheard, thus temporarily restoring the original decree.

Art. 164 of the Limitation Act applies to an application which involves setting aside the original decree under S. 108 of the Code, whether made to the original Court or to the Court of appeal after an appeal has been filed; and Art. 169 applies only to applications for the rehearing of an appeal heard *ex parte* in the absence of the respondent.

Art. 169 of the Limitation Act is wholly inapplicable to applications by a party, who has never been served, to set aside the whole proceedings in the suit; such applications are governed by Art. 164. **Sankara Bhatta v. Subraya Bhatta**, 17 M.L.J. 436.

BENSON and WALLIS, JJ.

Reference:—(a) 27 M. 602, *Li.*

(76) **Ss. 108, 552, 562, 564, 588, and 610**—*Ex parte decree—Power of appellate Court to remand suit for re-hearing on grounds other than those specified in S. 562.*

When a suit is decided *ex parte*, an appellate Court has jurisdiction, in an appeal against the decree so passed, to reverse the decree of the Court of first instance, on the ground that the first Court was wrong in proceeding to decide the suit *ex parte*, and to remand the suit for rehearing, such order of remand not being passed under S. 562 or for any of the reasons mentioned therein.

Per WHITE, C.J.—There is a power to remand a case when the appellate Court reverses an order refusing to set aside an *ex parte* decree, and it seems anomalous to hold that there is no such power when the appellate Court allows an appeal against a decree upon the ground that there ought not to have been an *ex parte* decree. **Sadhu Krishana Aiyar v. Kuppan Iyengar**, 1 M.L.T. 268 (F.B.) = 16 M.L.J. 479 = 30 M. 54.

WHITE, C.J. and SUBRAHMANIA Aiyar and BENSON, JJ.

References.—23 M. 445, 23 A. 167, *F*; 17 B. 733, 23 M. 260, *not followed*; 23 C. 738, 28 M. 447, 28 M. 437 and 12 A. 510, *R*.

(77) **Ss. 108, 622, and 647**—*Setting aside ex parte order absolute for foreclosure—Right to notice before order absolute—Interference in case of improperly delaying or refusing order*

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

absolute—See MORTGAGE (FORECLOSURE), No. 1, 3 N.L.R. 55.

(78) *Ss. 108 and 647—Presidency Small Cause Courts Act, Chapter VII—Ex parte order—Power of Small Cause Court to set aside the order.*

The Court of Small Causes at Bombay has inherent power to deal with an application to set aside an order made *ex parte*, and to set it aside upon a proper cause being substantiated. **Tyeb Beg Mahomed v. Ali Bhai Mangalji**, 8 Bom. L.R. 803=31 B. 45.

JENKINS, C.J. and BEAMAN, J.

Reference:—32 C. 253 (F.B.)=9 C.W.N. 81, F.

(79) *S. 111—Set-off—Bengal Tenancy Act (VIII of 1885), S. 67—Interest.*

In a suit for rent brought by a landlord, the tenant defendant claimed a set-off for costs decreed in his favour in a previous rent suit brought by the benamidar of the landlord against the defendant, and in which the landlord was made a *pro forma* defendant :

Held—that the set-off could not be allowed (a).

Interest was claimed in the suit at a rate of more than 12 per cent. per annum, on the basis of a *kabuliyat* executed before the passing of the Bengal Tenancy Act, the tenant being proved to have acquired the holding by private purchase :

Held—that the stipulation as to interest must be given effect to. **Tiluk Chandra Roy v. Jasoda Kumar Roy**, 11 C.W.N. 215.

CASPERSZ and GUPTA, JJ.

References:—(a) 10 C. 697 and 30 C. 1066, D.

(80) *S. 111—Set-off, right of, against receiver—Equitable set-off.*

S. 111 of the C. P. Code is not exhaustive and does not preclude the defendant from relying on an equitable set-off, which cannot be brought strictly within the terms of the section.

So, where a receiver sues for the debt due to a person, it is open to the defendant to urge against the receiver, a defence of set-off, which he could have urged against the creditor himself. Such a defence is allowable, although the sum claimed to be set-off is not "legally recoverable by the defendant from the plaintiff" (receiver), within the meaning of S. 111, C. P. C.

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

In such a case, it is further not necessary to have the written statement stamped as a plaint. **Subramanian Chettiar v. Muthuswami Aiyengar**, 17 M.L.J. 481.

WALLIS and MILLER, JJ.

(81) *Ss. 115 and 146—Written statement, received and not objected to, though not signed or verified according to law—Objection taken on appeal, after case fought out on merits—Appellate Court, if should give effect to objection.*

It is not obligatory upon a defendant to put in a written statement. He may do so if he likes. S. 146 of the Civ. Pro. Code contemplates that issues may be settled, whether there was a written statement or not, though it is not obligatory on the Court to frame issues, if the defendant makes no defence.

Where a written statement filed on behalf of the defendant was actually received by the Court, and no application was made by the plaintiff to have it taken off the file on the ground of its not being signed and verified by the defendant as required by S. 115 of the Civ. Pro. Code, and the question was raised for the first time in appeal, after the case had been fought out in the first Court on the footing of a proper written statement,

held that, in such circumstances, the appellate Court was not justified in decreeing the suit, on the footing that there was no defence, by reason of the written statement not being signed or verified by the defendant, and the case should have been tried on the merits. **Rustun Gazi v. Tara Prosanna Chowdhuri**, 11 C. W.N. 871.

MACLEAN, C.J., and HOLMWOOD, J.

(82) *S. 130—Inspection of documents produced by order of Court—High Court's power to interfere in revision with lower Court's exercise of discretion.*

Where documents are produced in obedience to an order of the Court made under S. 130, the Court has jurisdiction to deal with such documents, when produced, in such manner as appears just. The High Court cannot interfere in revision with the discretion exercised by the lower Court under this section. The principle, however, on which the discretion should be exercised in such cases is that, where the documents have been filed as relating to matters in issue in the suit, the opposite party should be allowed to inspect and take copies of them,

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

unless they relate *exclusively* to the case of the party producing them, and contain nothing to support his opponent's case. Further, when the documents, inspection of which is denied, are letters written by the party seeking inspection, a very strong case should be made out for refusing inspection. **Balamoni v. Ramasawmy Chettiar**, 17 M.L.J. 79=2 M.L.T. 88=30 M. 280.

BENSON and WALLIS, JJ.

References:—9 M. 257, 18 B. 35, F.

(83) S. 136—Power of Registrar (Original Side) to dismiss suit under, for want of prosecution—See HIGH COURT RULES (CALCUTTA), No. 1, 6 C.L.J. 374.

(83-a) S. 146—See No. 81, *supra*.

(83-b) S. 157—See Nos. 63 and 65, *supra*.

(83-c) S. 158—See Nos. 63 and 73, *supra*.

(84) Ss. 158 and 588—Power of District Judge to dismiss the suit under S. 158—*Appeal against an order of the District Judge, dismissing the suit under S. 158—Preliminary objection that no appeal lay from such an order of the District Judge—Order of District Judge, dismissing the suit under section 158, amounts to decree—Appellate Court, power of, to act under S. 158, confined to appeals before it.*

The plaintiffs-appellants after producing some evidence in the Court of first instance absented themselves on the date fixed by the Court for producing other evidence in the case. The Court, however, on the evidence as it stood on the record, passed a decree in favour of the plaintiffs-appellants. On appeal by the defendant, the District Judge allowed the appeal and passed an order, dismissing the suit, under the provisions of S. 158 of the Code. A further appeal was lodged by the plaintiffs-appellants against the order of the District Judge, dismissing the suit. On the hearing of the appeal a preliminary objection was taken, that no appeal lay as the order passed by the District Judge was under S. 158.

Held that the District Judge had no power on appeal to pass an order under S. 158, and even assuming that he had, he could only exercise such powers with reference to the appeal before him, and not with reference to the suit in the Court of first instance. The Judge having set aside what was undoubtedly a decree, his order dismissing the suit also amounted to a decree and an appeal lay from his order.

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

Kushar and another v. Jugrag Singh, 10 O.C. 245

CHAMIER, J.C.

(85)—Ss. 160 and 162—Witness—Non payment of expenses at the time of summons—Power of Court to order payment before passing decree.

Before the passing of a decree, the Court has power to order the payment of travelling and other expenses to a witness, who had been summoned by a party to the suit, in case where such expenses have not been paid at the time of issuing the summons.

Ss. 160 and 162 of the Code contemplate that the expenses should be paid by the party, who asks the Court to summon the witness, before he gives his evidence, but they do not declare that, unless this is done, the Court has no power to require their payment. They are intended for the benefit of the persons summoned and there is nothing in them to protect the party, who asks the Court to issue a summons, from his liability to pay the expenses of the witness, if the Court, *per in curiam*, or in order to save delay, issues the summons without seeing that the party applying for the summons discharges the duty imposed on him by law. **Chenchuramayya v. Narasimhayya**, 17 M.L.J. 435.

BENSON, J.

(85-a) S. 162—See No. 85, *supra*.

(85-b) S. 196—See No. 235, *infra*.

(86) S. 199—Judgment written when Judge on leave—Delivery by successor in office—Validity—Evidence Act (I of 1872), S. 65 cl. (e) and cl. (g)—Collectorate records—Evidence of record-keeper and clerks as to general result of their examination of the records—Admissibility.

Where a Judge who had heard a case took leave, before putting his judgment in writing, and his judgment subsequently written was delivered by his successor in office.

Held, that the judgment was properly pronounced, the provisions of S. 199, Civil Procedure Code, having been complied with.

When, in order to ascertain the history of certain properties in suit, the Judge took the evidence of the record-keeper and clerks in charge of the Collectorate records and registers, as to the general result of their examination of

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

these documents, and it did not appear that the documents could be conveniently examined in Court,

Held, that S. 65, cl. (c) of the Evidence Act does not require that certified copies of the records should be produced in such circumstances, the case falling within the provision of cl. (g) of that section, and the Judge acted rightly under the latter clause. **Rani Sundar Koer v. Chandreshwar Prosad Narayan Sing**, 11 O. W.N. 501 = 34 C. 298.

HARINGTON and GEIDT, JJ.

(87) S. 203—Subordinate Judge invested with Small Cause Court powers—Judgment—Reasons for the judgment.

The Court of a Subordinate Judge invested with Small Cause Court powers is governed by paragraph (1) of S. 203 of the Civil Procedure Code (1882). The judgment written by a Subordinate Judge, as a Court of Small Causes, need not, therefore, contain more than the points for determination and the decision thereon. **Narayan Sitaram v. Bhaga Ganga**, 9 Bom. L.R. 327 = 31 B. 314.

JENKINS, C.J., and CHANDAVARKAR and BEAMAN, JJ.

References:—23 B. 382, 8 B. 230, 12 B. 31, 9 B. 174, 8 B. 270, R.

(88) S. 203—Procedure to be followed in appealable cases—See LIMITATION ACT, No. 97, 4 P.W.R. 1907 = 27 P.L.R. 1907.

(89) S. 206—Power to amend decree—Jurisdiction.

The proceedings under S. 206 of the Civ. Pro. Code terminate in an order (which can be dealt with in revision by the High Court).

An order passed under S. 206, which makes additions in the decree not warranted by the judgment, is beyond the jurisdiction of the Court passing it. **Bai Shri Yaktuba v. Agar-sangji Raisungji**, 9 Bom. L.R. 547 = 31 B. 447.

JENKINS, C.J., and BEAMAN, J.

(90) S. 206—Effect of application to bring decree into accordance with judgment—Limitation—Step in aid of execution.

Held that an application under S. 206 of the Code of Civil Procedure to bring a decree into accordance with the judgment does not give a fresh starting point to limitation, and cannot be regarded as an application to the proper Court to take a step in aid of execution.

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

Awadh Bihari Pande v. Mahadeo Bahl, A.W.N. (1907), 169 = 4 A.L.J. 469.

KNOX, C.J., and RICHARDS, J.

References:—20 A. 304, 27 A. 575; F. 25 C. 258, Diss.

(91) S. 206—See ACT XXIII OF 1871 (PENSIONS), No. 1, 95 P.R. 1906 = 83 P.L.R. 1907.

(92) S. 210—Formal order not drawn up—Construction of order—Real intention—Limitation.

In construing pleadings, judgments and decrees and orders passed in this country, the most liberal construction must always be accepted.

Where a judgment was passed on the 21st July, 1902, and on the 24th, an arrangement by the parties to pay the decretal amount by instalments was filed and explained to the judgment-debtor, who accepted the terms, but no formal orders were passed under S. 210, Civ. Pro. Code, and the formal decree in the case was drawn up on the 25th, according to the original judgment, the decree bearing the date of the judgment, and, thereafter, the judgment-debtor paid the instalments regularly up to June, 1905:

Held, an application by the decree-holder for execution for the balance of the judgment-debt, presented on the 17th February, 1906, was not barred. **Kedar Nath Banerjee v. Kulman Sardar**, 5 C.L.J. 25.

MITRA and HOLMWOOD, JJ.

(93) S. 210—Money decree—High Court decree can be made payable by instalments—See CONTRACT ACT, No. 7, 9 Bom. L.R. 143 = 31 B. 348.

(94) Ss. 210 and 622—Decree for rent under Bengal Tenancy Act—Payment by instalments—See ACT VIII OF 1885 (BENGAL TENANCY), No. 1, 11 C.W.N. 857.

(94-a) S. 211—See No. 48, *supra*.

(94-b) S. 212—See No. 48, *supra*.

(95) Ss. 223 and 229—Foreign territory—Execution—Court at Kondh.

The Court of the Subordinate Judge of Kondh is not a Court established in the territory of a foreign Prince or State within the meaning of S. 229, C.P.C.

A decree of the Court of the Native Commissioner or Sub-Judge of Kondh was transferred for execution by the Court of the Sub-Judge at Saran.

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

Held that it may be executed in the Court of Sub-Judge of Saran.

S. 223, C.P.C., is not limited in its application to Courts established under, and governed by the Bengal Courts Act and the corresponding Acts of the other provinces. **Maharaja Prabhu Narayan Singh Bahadur v. Saligram Singh**, 11 C.W.N. 622=6 C.L.J. 30=34 C. 576.

MOOKERJEE and HOLMWOOD, JJ.

(96) *Ss. 223, 258 and 649—Court passing decree—Transfer of jurisdiction—Application for transfer of decree made to Court passing decree—Limitation Act, Art. 199, cl. (4)—Step in aid of execution—Meaning of “judgment-debtor.”*

The Court, which passed a decree ordering sale of certain property, does not cease to exist for the purpose of S. 649 of the Code, when the area, in which the property ordered to be sold is situate, is transferred to the jurisdiction of another Court. Nor does the Court passing the decree cease to have jurisdiction to execute the decree by virtue of the transfer. S. 223 provides that a decree may be executed by the Court that passed it. Therefore, that Court, in spite of the transfer of jurisdiction, has power to execute the decree (a).

The decree-holder is bound to apply to the Court which passed the decree, for a transfer to the other Court, and such an application is a step in aid of execution within the meaning of cl. (4), Art. 179 of the Limitation Act.

The word “judgment-debtor” in S. 258 should be construed as including those who claim through him or in his right, *e.g.*, an assignee from the judgment-debtor of the equity of redemption after decree. **Panduranga Mudaliar v. Vythilinga Reddi**, 17 M.L.J. 417. =2 M.L.T. 466.

SUBRAHMANYA AIXAB, OFFG. C.J., and WALLIS, J.

Reference :—(a) 25 C. 315, R.

(16-a) S. 228—See No 128, *infra*.

(96-b) S. 229—See No. 95, *supra*.

(97) *Ss. 230 and 108—Money decree—Application to execute after expiry of twelve years—Fraudulent conduct of judgment-debtor delaying execution—Fivolous application under S. 108, C.P.C.—Discretion of Court.*

Where, pending execution of a money decree, the judgment-debtor made a frivolous applica-

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

tion to set it aside under S. 108, C.P.C., with a view to delay the execution proceedings,

held, that the conduct of the judgment-debtor was fraudulent, within the meaning of the final clause of S. 230, Civil Procedure Code.

The Court, to which an application to execute a money decree is made, more than twelve years after the date of the decree, should exercise a sound discretion in deciding whether the execution should proceed or not. If the Court should find, on evidence, that the decree-holder had been diligent in proceeding with the execution, from the date that the decree was passed and that the judgment-debtor's conduct was such that it caused unnecessary delay in levying execution, he or she having acted fraudulently or used force, the Court ought to allow execution. **Raj Sham Kissen v. Damar Kumari Debi**, 11 C. W. N. 440.

MITRA and HOLMWOOD, JJ.

(98) S. 230 (a)—Appeal by some of the defendants against pronouncement of decree—Appeal dismissed—Limitation for executing remaining portion of decree—See LIMITATION ACT, No. 135, 32 P.R. 1907.

(99) *Ss. 230 and 539—Decree directing performance of puja and giving of honours to a deity “according to usage” of a religious institution—Nature and execution of the decree.*

A decree, so far as it directs performance of puja and the giving of honours to a deity, “according to the usage” of the religious institution in question, is merely a declaratory decree, and the Court cannot, in execution, undertake to see that the trustee (judgment-debtor) acts in accordance with the usage of the institution, for, the Court would then have to supervise religious matters, which are not within the province of Civil Courts (a). If the trustee fails to do his duty, it may be a reason for removing him by means of a suit properly framed for the purpose, in which case the enquiry into the religious usages of the temple would be ancillary to the determination of a question of civil right, *viz* the right to remove the trustee (b) **Janakrama Reddi v. Thiruvankada Ramaswami Chari**, 2 M.L.T. 94.

BENSON and WALLIS, JJ.

References :—(a) 5 B. 80, 8 M.L.A. 859 (P.C.), F. (b) 23 M. 298, 18 C. 448 (P.C.), F.

(100) *Ss. 231 and 244—Applications under S. 231 treated under S. 244—Appealability.*

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

Where an order appealed from purported to decide questions to be dealt with under S. 244 of the Code party against whom it is passed is entitled to an appeal therefrom (a). **Srimat Bhayankaran Rangachari v. Srimat Bhayankaran Ranganathachari**, 2 M.L.T. 307.

BODDAM and MOORE, JJ.

References:—23 M. 517, 28 M. 127, F.

(101) S. 232—*Decree—Execution—Transfer of decree by operation of law—Decree transferred to one of the persons against whom it is passed as the legal representative of a deceased and against the property of the deceased—Execution by the transferee—“A decree for money against several persons,” meaning of.*

A decree was passed against P, as the legal representative of his brother A (deceased), and against S, as the legal representative of her father-in-law L (deceased). The decree directed that the plaintiff (decree-holder) should recover Rs. 22,748 and costs from the property of each of the two deceased above-mentioned. After making other provisions, the decree provided: “It will also be decided, during the execution proceedings, as to how far the heir defendants are personally liable in this suit.” The plaintiff died soon after obtaining the decree, which was transferred by operation of law to his heir P. Subsequently, P applied to execute the decree against S. The Court rejected the application for execution, upon the ground that it was a decree for money against P and S “jointly as well as severally.”

Held, (1) that there was nothing in the decree which saddled P and S with any personal liability to pay money, either jointly or severally: that question was expressly reserved by the decree for determination in the course of execution proceedings.

(2) that the amount of Rs. 22,748 and costs, which was recoverable under the decree, was made payable, not by P and S personally, but out of the property of the deceased A and L.

• (3) that, no doubt, by reason of the direction in the decree that the question of the personal liability of P and S should be determined in execution proceedings, there might subsequently be, when that liability had been determined, a decree for money against them; but till then, it was a mere contingency, which could not make the decree, as it existed, a decree for money against P and S.

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

(4) that, therefore, S. 232 of the Civ. Pro. Code placed no bar to the decree of P being executed against the property of L in the hands of S.

The expression “a decree for money against several persons” in S. 232 of the Civ. Pro. Code, 1882, means a personal decree for the payment of money by two or more defendants jointly. Cl. (b) of S. 232 does not extend to a decree, which may become a decree for money against several persons, on determination by the Court. It applies only where, in the decree, there is a distinct order upon the defendants personally to pay the money. **Panachand Pomaji v. Sundrabai Thakurji**, 9 Bom. L.R. 409=31 B. 308.

CHANDAVARKAR and PRATT, JJ.

(102) S. 232—*Application by decree-holder's representative to be recognised as decree-holder—Limitation Act, Art. 179, cl. 4—Step in aid of execution.*

An application made by the legal representative of a decree-holder for recognising him as the decree-holder, is not prohibited by the Code. Such an application is, therefore, an application to take a step in aid of execution. **Srinivasa Iyengar v. Dharni Mudaly**, 17 M.L.J. 475.

BENSON and MILLER, JJ.

Reference:—26 A. 301, R.

(103) S. 232—*Sale of property, the subject of a decree—Right to execute the decree.*

The sale of property for the possession of which the vendor has obtained a decree, does not, necessarily, carry with it the right to execute the decree.

The vendor obtained a decree for possession of certain property. He sold portions of the property to the respondents who applied for execution of the decree; *held* that no application could legally be made to execute the decree under S. 232 of the Civ. Pro. Code, **Hansrajpal v. Mukhrji**, 4 A.L.J. 759=A.W.N. (1907), 280.

KNOX, A.C.J., and RICHARDS, J.

(104) S. 322—*See LIMITATION Act, No. 131, A.W.N. (1907), 39.*

(104-a) S. 232—*See Nos. 4 and 5, supra.*

(105) Ss. 232 and 238—*Sale of mortgaged property by transferee of money-decree from the mortgagee—Validity—Applicability of S. 99*

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

of the Transfer of Property Act—See TRANSFER OF PROPERTY ACT, No. 40, 17 M.L.J. 503.

(106) *Ss. 232 and 244—Hindu Law—Dayabhaga School—Mother's share on partition, if disposable by Will—Life-interest—Application for execution of decree by her executor—Refusal—Appeal.*

Under the Hindu Law, according to the Bengal School, when upon partition a share is given to the mother, she gets it simply in lieu of, or as provision for her maintenance, and not because she is a co-parcener in the estate, and the share reverts, upon her death, to her sons, out of whose portion it was taken (a).

When an application, by the executor to the estate of a Hindu lady, to execute a decree, which fell to her share, upon a partition of her husband's estate between herself and her sons was refused on the objection of the sons and the judgment-debtors, that the lady had only a life-interest in the decree, and that it passed on her death to her sons,

Held,—that appeal lay from the order under S. 244, Civ. Pro. Code, the question arising being a question between the legal representative of the lady and the judgment-debtors. **Hridoy Kant Bhattacharjee v. Behari Lal Mookerjee**, 11 C.W.N. 239.

GHOSE and CASPERSZ, JJ.

References :—(a) 13 C. 336 (340), 15 C. 292 and 16 C. 758, F.

(107) *Ss. 232 and 368—Application by transferee of decree to bring in defendant's representative on record—Limitation Act, Art. 179, cl. 4—Step in aid of execution.*

There is nothing in S. 232 of the Code to prohibit the transferee of a decree, from applying for and obtaining an order, under S. 368 of the Code, to bring in the representatives of a defendant on record. Such an application is a step in aid of execution. **Mahalinga Moopnar v. Kuppanchariar**, 17 M.L.J. 485.

BENSON and WALLIS, JJ.

(108) *Ss. 232 and 372—Plaintiff assigning decree pending suit—Assignee's right to execute decree in plaintiff's favour.*

The words "decree-holder" in S. 232 must be construed as meaning decree-holder in fact, and not as including a party who, in equity, may afterwards become entitled to the rights of the actual decree-holder; and the words of the same section relating to the transfer of a decree

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

cannot be construed so as to apply to a case where there was no decree in existence at the time of the assignment. So, where, during the pendency of a suit, the plaintiff assigned the decree to be passed in his favour, to a third person, who was not made a party to the suit, and the final decree was passed in favour of plaintiff alone, the assignee is not entitled to execute the decree under S. 232, as there was no decree in existence at the time of the assignment. **Basroor Yittal Bhandari v. Ramachandra Kamthi**, 2 M.L.T. 197=17 M.L.J. 391.

WHITE, C.J., and MILLER, J.

References :—16 M. 429, R; 21 M. 388, D.

(108) (a) S. 232—See No. 105, *supra* a.

(109) S. 234—*Executing Court's power to make an order under*,—*Validity of such order—Waiver of objection.*

The only Court, which can make an order under S. 234 of the Code, bringing the legal representatives of a deceased decree-holder on record, is the Court which passed the decree, and not the Court to which the decree is transferred for execution (a). But the order of the latter Court in such a case, if it was perfectly competent to deal with the jurisdiction of the kind arising in execution of decrees passed by itself, cannot be considered as void, so as to be incapable of being validated by consent or waiver (b). **Thamboo Pillai v. Sriramulu Naidu**, 17 M.L.J. 300.

BENSON and MILLER, JJ.

References :—(a) 28 M. 466, F; (b) 27 M. 118 and 28 M. 437, R.

(110) *Ss. 234 and 244—"Legal representative," meaning of—Decree against Mitakshara father—Execution on his death against ancestral property in son's hand—Hindu Law—Mitakshara—Father's debt—Son's pious duty to pay.*

Per Curiam (Harington and Geidt, JJ., dissenting).—When, on the death of a member of a joint Mitakshara family, against whom a decree for money has been passed, his son is brought on the record as his legal representative the question of the liability of the ancestral property, which the son acquires by survivorship, for the debt covered by the decree, may be determined in the execution proceedings, and a separate suit is not necessary.

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

Meaning of the expression "legal representative" discussed. **Amar Chandra Kundu v. Sebak Chand Chowdhry**, 11 C.W.N. 593 = 5 C.L.J. 491 = 2 M.L.T. 207 = 34 C. 642.

MACLEAN, C.J., and HARINGTON, BRETT, MITHA and GRIDT, JJ.

(111) *Ss. 235 and 248—Addition of parties—Party appellant—Test—Guardian ad-litem—Appointment, how long continues—Court of Wards Act (IX of 1879 B.C.), Ss. 5, 35 and 51—Property not taken charge of—Court of Wards—Guardian.*

When a person applies to be added as a party appellant, the test is whether he can urge any of the grounds, upon which the validity of the original Court's order is called in question. If he cannot, he ought not to be added as an appellant.

Where a person is named as the guardian *ad litem* in an application for execution, and notice under S. 248 of the Civ. Pro. Code is issued upon him as such guardian, it must be presumed that he has been appointed guardian by implication by the Court; his appointment subsists, so long as the *lis* is pending, and until it is formally revoked by the Court.

When the manager under the Court of Wards has not taken possession of a certain property, the Court is not in charge of such property and cannot deal with it; and in a litigation with respect to such property, the manager of the Court of Wards need not necessarily be made the guardian or next friend of the ward. **Krishna Pershad Singh v. Gosta Behari Kundu**, 5 C.L.J. 434.

MOOKERJEE and HOLMWOOD, JJ.

References:—14 C. 204; 15 I.A. 195 = 16 C. 40; 30 I.A. 182 = 30 C. 1021; 24 A. 383; 28 A. 137; 14 A. 35 and 22 M. 187, *Refd. to*.

(112) *S. 244—Decree for delivery of possession of equity of redemption—Wrongful delivery of land, instead of equity of redemption—Suit by mortgagee for restitution of land so delivered—Application of S. 244.*

S. 244 bars a regular suit, where the question relating to execution of a decree is raised *bona fide*. But when the decree itself is, on the face of it, wholly irrelevant to the question raised, and the wrong-doer takes the plea of bar to shield his unlawful gain secured even against the express orders of the executing Court, possibly in collusion with the officer exe-

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

cuting the decree, and in the absence of the judgment-debtors, S. 244 would seem to have no application. So, where a person sued to enforce his right of pre-emption, in a property subject to mortgage, and got a decree directing delivery of possession of the equity of redemption therein, but, in execution of the decree, the Patwari delivered possession of the property itself, instead of the equity of redemption, a regular suit by the mortgagee, claiming restitution of the property so wrongfully delivered cannot be said to be barred by S. 244, as the question raised in the suit does not relate to the execution, discharge or satisfaction of the decree (a). Even if there were any room for doubt on this point, the plaint may be treated as an application for execution of decree for claiming restitution of lands wrongfully delivered by the Patwari in executing the decree (b). **Karam Chand v. Khuda Bakhsh**, 5 P.R. 1907 = 40 P.W.R. 1907.

LAL CHAND, J.

References:—(a) 11 W.R. 516, *F.* (b) 22 C. 483, 22 A. 121, 28 M. 64, 32 C. 332, *F.*; 5 M. 391, 7 M. 255, 23 M. 55, 16 M. 287, 4 M. 285, 12 W.R. 85, 14 W.R. 39, 12 B. 449, 9 A. 229, 8 C.W.N. 353, 9 P.R. 1889, 63 P.R. 1901, 45 P.R. 1904, *R.*

(113) *S. 244—Debt of judgment-debtor before sale—Sons and grandsons, if bound—Representatives for purposes of execution.*

Held, that the persons, who take the judgment-debtor's share in the joint family property by survivorship, are representatives of the judgment-debtor, within S. 244, Civ. Pro. Code, and that it is not open to them to object that the debt, for the recovery of which the decree had been obtained, was tainted with immorality and illegality. **Peary Lal Sinha v. Chandi Charan Sinha**, 11 C.W.N. 163 = 5 C.L.J. 80.

RAMPINI and MOOKERJEE, JJ.

References:—24 C. 62, *Appl.*, 9 C.W.N. 134, *R.*

(114) *S. 244—Rent-sale of occupancy holding—Application by mortgagee to set aside sale—Transferable holding—Representative of judgment-debtor.*

A person, to whom a transferable occupancy holding was mortgaged, before its sale in execution of a rent-decree, is a representative of the judgment-debtor, within the meaning of S. 244, Civ. Pro. Code, and may apply to set aside

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

the sale, under that section (a). **Srimati Nissa Bibi v. Radha Kishore Manikya**, 11 C.W.N. 312.

GHOSE and GEIDT, JJ.

References :—(a) 24 C. 62 (F.B.) and 9 C.W. N. 134, *followed*.

- (115) S. 244—*Abandonment of claim against defendant—Non-removal of defendant's name from suit—Defendant, whether party to suit.*

Where the plaintiff in a suit abandoned his claim against the defendant, not being able to serve him with notice, *held* that the defendant was not a party to the suit, notwithstanding the fact that the defendant's name was not removed from the suit. **Yenkatapathi Naidu v. Subraya Mudali**, 17 M.L.J. 416.

BODDAM, J.

References :—21 M. 45, 23 M. 361, R.

- (116) S. 244—*Simple money-decree against father—Objection to execution on sons—Fresh suit against sons instituted on strength of such objection—Estoppel.*

The defendants, the sons of a judgment-debtor objected to the execution of a decree obtained against the judgment-debtor, on the ground that the property, being ancestral, cannot be sold in execution of a simple money-decree obtained against the father, and that a fresh decree should be obtained against them. The Court dismissed the application for execution on that ground.

Held that the defendants were not entitled to plead S. 244 of the Code as bar to a subsequent suit instituted on the strength of their former plea; and it matters nothing that the suit as framed was not exactly the suit suggested by the plea of the defendants. **Jagannadha Row v. Kurmayya**, 17 M.L.J. 314.

SUBRAHMANYA AIYAR and MILLER, JJ.

- (117) S. 244—*Damages resulting from acts done under cover of execution proceedings, suit for, maintainability of—Execution Court, jurisdiction—Execution, discharge or satisfaction, relating to—Small Cause Court, reasons for finding.*

Under S. 244 of the Civ. Pro. Code, the Court executing the decree could only restore to the rightful owner land of which he had been deprived in the execution proceedings in excess of that decreed, and that where damages

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

had resulted from acts done under cover of the execution proceedings, either by the decree-holder, or at his instigation or suggestion, a separate suit for the recovery of such damages lies against the decree-holder (a).

The question of an assessment of damages for injury arising from the fact that execution was taken out in excess of the relief granted under the decree, is not one relating to the "execution, discharge or satisfaction of the decree" itself but is one outside the decree (b).

A Small Cause Court Judge is not bound to fully set out the reasons for his findings (c). **Deno Nath Banikya v. Ram Kumar Chakrabutty**, 6 C.L.J. 527.

BRETT and MOOKERJEE, JJ.

References :—(a) 11 W.R. 516, 12 W. R. 85 and 12 B.L.R. 201, F; (b) 7 W. R. 45, R; (c) 23 B. 334, 13 A. 533, D.

- (118) S. 244—*Auction-purchase—Trespass by judgment-debtor, decree-holder and other persons—Suit by purchaser for compensation not barred by S. 244.*

The plaintiff purchased a *poramba* in Court-auction and the sale was confirmed, but before he obtained possession, the decree-holder and judgment-debtor joined with other persons and carried away some of the materials of a building standing upon the land. *Held*, that a suit for compensation against all these persons, who were joint wrong-doers, was not barred by S. 244, Civ. Pro. Code, as the question between the parties was not one relating to the execution of the decree. **Kolintavita Antathodan Mama Amina v. Kolintavita Muyyarikandi Bevachi Haji**, 17 M.L.J. 543.

MILLER, J.

(119) S. 244—*Delay in appealing against execution-proceedings—See LIMITATION ACT, No. 8, 8 Bom. L.R. 858 = 31 B. 38.*

(120) S. 244—*Execution-sale in contravention of S. 99, Transfer of Property Act—Purchase by mortgagee, and purchase by stranger, effect of—See TRANSFER OF PROPERTY ACT, No. 70, 17 M.L.J. 163 = 2 M.L.T. 181 = 30 M. 313.*

(121) S. 244, applicability of, to Agency Tracts—*See LIMITATION ACT, No. 59, 17 M.L.J. 147 = 2 M.L.T. 195 = 30 M. 280.*

(122) S. 244—*Suit to set aside certificate sale—See ACT I OF 1895 (PUBLIC DEMANDS RECOVERY, BENGAL), No. 4, 5 C.L.J. 638.*

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

(123) S. 244—Avoiding sale of mortgaged property—Remedy—See TRANSFER OF PROPERTY ACT, No. 39, 11 C.W.N. 1011=6 C.L.J. 320 (F.B.).

(124) S. 244—Applicability to person not party to proceedings—See ATTACHMENT, No. 1, 17 M.L.J. 334=2 M. L. T. 365=30 M. 413.

(125) S. 244—Sale under first mortgage—Disposal of surplus sale proceeds—Appeal—See MORTGAGE (GENERAL), No. 21, 4 A. L. J. 492.

(126) S. 244—Consent decree against a qualified female proprietor—Objection to its execution against reversioner—Overruling of such objection—Applicability of the section—See LIMITATION ACT, No. 81, 17 M.L.J. 288=2 M.L.T. 360=30 M. 402.

(126-a) S. 244—Dispute as to right way of executing a decree to be dealt with under—See PRACTICE, No. 2, 9 Bom. L.R. 1361.

(126-b) S. 244—See Nos. 28, 48, 74, 100, 106 and 110, *supra* and No. 192, *infra*.

(127) S. 244 (c)—*Application of, where objection is raised to the decree itself, and not to its execution, &c.—Objection by party defendant to sale of mortgaged property ordered to be sold by decree.*

Where, on an application to make a mortgage decree absolute and for an order for the sale of the property, a party defendant seeks to stop the sale, contending that the decree passed against him is not binding on the property, on the ground that, since the decree, he has been adopted into the family of another person to whom the property belongs, the objection is an objection to the decree itself, and not to the execution, discharge or satisfaction of the decree, and, therefore, S. 244 (c) does not apply to the case. **Kumaratta Servaigaran alias Chinnaaswami v. P.L.S.A.R. Sabapathy Chettiar**, 16 M.L.J. 545=30 M. 26.

BODDAM and WALLIS, JJ.

References:—19 A. 480, 21 A. 277, 25 C. 133 32 C. 265, F; 7 M. 255, D.

(127-a) S. 244 (c)—See No. 175, *infra*.

(128) Ss. 244 and 248—*Decree satisfied—Application by judgment-debtor for refund on the ground of fraud—Jurisdiction of the Court.*

A Court, to which a decree has been transferred for execution, is competent to entertain an application, by a judgment-debtor, to the effect that, when the decree was executed, it was barred by time, and he paid in the decretal

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

amount on account of the fraud practised upon him by the decree-holder, in not mentioning the fact of a previous application being dismissed as barred by time, and asking for a refund of the amount paid by him. The jurisdiction of the Court does not cease by the fact that satisfaction of the decree was entered and execution proceedings had terminated. **Panna Lal v. Chakkan Singh**, 4 A.L.J. 142=A.W.N. (1907), 65.

KNOX and RICHARDS, JJ.

Reference:—24 A. 239, F.

(129) Ss. 244 and 278—*Execution of decree against karnavan of Malabar tarwad—Resistance by members of the tarwad.*

When a decree has been given against the karnavan, as representing the members of the whole tarwad, all the members of the tarwad must be taken to be parties to the suit, for the purpose of execution proceedings; and, if parties, they must proceed under S. 244, and not under S. 278. The fact that they claim the property which has been attached, adversely to the other members of the tarwad, does not make them any less constructive parties to the decree. **Marivittil Moolamparol Mathu Amah v. Pathramkunnath Cherukot**, 2 M.L.T. 31=30 M. 215=17 M.L.J. 377.

BENSON and WALLIS, JJ.

References:—24 M. 658, F; 23 M. 195, 10 M.L.J. 85, *Expl. and D*; 14 M.L.J. 137, R.

(130) Ss. 244 and 291—*Mortgage-decree—Sale—Stay—Right of auction-purchaser before confirmation of sale to deposit decretal amount and costs—Representative of judgment-debtor—Inchoat title—Right to redeem—Transfer of Property Act (IV of 1882), S. 91.*

A first mortgagee obtained a decree on his mortgage in the presence of the second mortgagee. When he proceeded to sell the mortgaged properties, an auction-purchaser of the properties, at a sale held in execution of a decree obtained on the second mortgage—which sale, however, had not yet been confirmed by Court—deposited the decretal amount under S. 291, C.P.C., and prayed that the sale might be stopped.

Held—that the auction-purchaser was a representative of the judgment-debtor, second mortgagee, within the meaning of S. 244, C.P.C., and he was entitled to make the deposit (a).

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

Radha Kishūn Marwari v. Hem Chandra Bose, 11 C.W.N. 495.

RAMPINI and SHARFUDDIN, JJ.

References:—(a) 24 C. 62. *F.* (b) 4 C.W.N. 317=27 C. 966, *Refd.* to.

(131) *Ss. 244 and 291—Rival decree-holders—Order distributing surplus proceeds of a putni sale amongst—Appeal—Representative of judgment-debtor—Attaching creditor.*

Where, the surplus sale proceeds of a *putni* sale having been attached by two judgment creditors of the *putnidar* on different dates, the District Judge made an order for the rateable distribution of the sale proceeds amongst them, and one of them appealed against that order, the judgment-debtor himself remaining indifferent:

Held—that no appeal lay, an attaching creditor of the judgment-debtor not being his representative, within the meaning of S. 244, C.P.C. (a).

S. 244, C.P.C., does not apply, when the question concerns two rival decree-holders. **Ram Chunder v. Mussett Hamirain**, 11 C.W.N. 433=6 C.L.J. 437.

RAMPINI and MOOKERJI, JJ.

References:—(a) 29 M. 318, 16 M. 23, 15 C. 371, 16 A. 483, *distgd.* 24 C. 62, A.W.N. (1906), 62, *R.*

(132) *Ss. 244, 291 and 311—Execution sale brought about by fraud—Waiver of right to object to sale—See WAIVER*, No. 2, 11 C.W.N. 848=6 C. L. J. 62.

(133) *Ss. 244 and 310 A—Decree-holder—Judgment-debtor—Auction purchaser—Representative—Appeal.*

Where the auction-purchaser is a third person, and not the decree-holder, and whereupon an application being made by the judgment-debtor under S. 310-A, Civ. Pro. Code, to set aside the sale, it is not contested by the decree-holder, so that no question arises between the decree-holder and the judgment-debtor, the order made by the Court does not fall within S. 244, Civ. Pro. Code, and is, consequently, not appealable. **Amir Rai v. Basdeo Singh**, 5 C.L.J. 404.

RAMPINI and MOOKERJEE, JJ.

References:—26 C. 449, 1 C.W.N. 703, 21 M. 416, *D.*

(134) *Ss. 244 and 310 A—Application under S. 310-A by transferee from judgment-*

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

debtor—Appeal from order rejecting application.

The question of setting aside a sale under S. 310-A relates to the execution of a decree (a). The auction-purchaser is the representative of the decree-holder for the purposes of S. 244 (b). A transferee of the judgment-debtor's interest after the Court-sale is a representative of the judgment-debtor. Where, therefore, an order was passed by the District Munsiff rejecting an application under S. 310-A, on the ground that it was not made by the judgment-debtor, but by a transferee who had acquired the interest of the judgment-debtor after the date of the Court-sale, an appeal lies to the District Judge under S. 244, as the question was one relating to the execution of the decree, and as it arose between the representatives of the parties. **Manikka Odayan v. Rajagopala Pillai**, 17 M.L.J. 291=2 M.L.T. 347.

BENSON and WALLIS, JJ.

References:—(a) 21 M. 416, 26 C. 449, 19 C. 683, *R.*; (b) 28 M. 87, 19 C. 683, 24 C. 62, 25 M. 529, *R.*

(135) *Ss. 244 and 311—Sale, setting aside—Second appeal—Order, passing of, event happening after,—Duty of Appellate Court—Ex parte decree—Sale—Application to set aside ex parte decree, pending—Court, discretion of.*

When the judgment-debtor does not seek to set aside the sale on the ground of any material irregularity in the publication or conduct of the sale as contemplated by S. 311 of the Civ. Pro. Code, but on grounds which, if valid, can be advanced only under S. 244 of the Code, for instance, the ground that the decree, in execution of which the decree-holder purchased the property, has been subsequently set aside, a second appeal lies (a).

It is not only competent to a Court of appeal, but it may be its duty to take notice of events which have happened since the order challenged in appeal was made (b).

When a sale has been set aside on the ground that the decree, in execution of which the sale took place, has been nullified by an *ex parte* decree in a regular suit, and an appeal has been preferred against the order setting aside the sale, if, during the pendency of the appeal, the *ex parte* decree is set aside and the original decree restored, the appeal ought to be allowed

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

and the sale restored. **Ramyad Sahu v. Bindeshwari Kumar Upadhyay**, 6 C.L.J. 102.

BRETT and MOOKERJEE, JJ.

References:—(a) 27 C. 810 and 31 C. 499, R.
(b) 6 C.L.J. 92 and 6 C.L.J. 74, F.

(136) Ss. 244 and 312—Non-service of notice under S. 10, Public Demands Recovery Act, effect of—Suit to set aside sale on ground of non-service—See ACT I OF 1895 (PUBLIC DEMANDS RECOVERY), No. 3, 11 C.W.N. 745=34 C. 787.

(137) Ss. 244 and 318—Dispute between judgment debtors—Application for possession—Objection that property purchased with the money of one of them not entertainable in execution—Appeal—Execution Court.

A dispute between the judgment-debtors does not relate to the execution, discharge or satisfaction of the decree, and cannot be gone into by a Court executing the decree. Where, therefore, certain property was sold in execution of a decree and the sale was confirmed, but the purchaser applied under S. 318, Civ. Pro. Code, that possession be made over to one of the two judgment-debtors, to which the other judgment-debtor objected, on the ground that the property was purchased with her money, which she had given to the other judgment-debtor, who had misappropriated it, but she did not apply to set aside the sale, *held* that the dispute did not relate to the execution of the decree, but should be settled in a separate suit brought for the purpose, and no appeal lay to the High Court from the order refusing to determine the dispute between the judgment-debtors. **Kastura Kunwar v. Gya Prasad**, 4 A.L.J. 47=A.W.N. (1907), 29=29 A. 207.

KNOX and RICHARDS, JJ.

(138) Ss. 244 and 318—Judgment-debtor, objector—Appeal.

When an application is made by the assignee of the decree-holder purchaser for an order under S. 318 of the Civ. Pro. Code, the mere fact that the judgment-debtors put in an objection, does not make it an application under S. 244 of the Code, so as to entitle the judgment-debtor to appeal against the order passed by the Court of first instance or by the Court of first appeal. **Mahomed Mosraf v. Habil Mia**, 6 C.L.J. 749.

BRETT and MOOKERJEE, JJ.

Reference:—1 C.W.N. 658, R.

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

(139) Ss. 244 and 335—Mortgagee from judgment-debtor after attachment—Representative.

A mortgagee under a mortgage from the judgment-debtor after attachment is a representative of the judgment-debtor within the meaning of S. 244 of the Code. S. 335 of the Code has no application to such a case. **Narayanasawmi Naick v. Seshappier**, 17 M.L.J. 321.

BENSON and WALLIS, JJ.

References:—20 M. 378, 28 M. 119, 28 C. 492, 31 C. 737, R.

(140) Ss. 244, 396 and 588—Appeal from an order made on an application for appointment of a Commissioner.

An application, under S. 396 of the Code for the appointment of a Commissioner, is not a matter which comes within the scope of S. 244. No appeal lies from the order made on the application, since it is not an order, from which a right of appeal is given by S. 588 of the Code. **Mallayya v. Subbarayudu**, 17 M.L.J. 144.

WHITE, C.J., and MILLER, J.

References:—28 M. 127, D., C.M.A. 14 of 1906, followed.

(141) Ss. 244 and 583—Application for restitution—Suit barred—Suit tried as application.

Where a decree-holder obtains possession of the property without intervention of Court and the decree is reversed on appeal, no suit lies for possession of the property so taken possession of after the decree of the lower Court. Ss. 244 and 583 bar such a suit, the language of these sections being imperative (a).

Where instead of an application for restitution, the plaintiff brought a suit for possession but prayed that his suit may be treated as an application for execution, *held*, that his prayer should be granted. **Sheodahal v. Bhawani**, 4 A.L.J. 188=A.W.N. (1907), 90=29 A. 348.

STANLEY, C.J., and BURKITT, J.

References:—(a) 22 A. 79 and 25 A. 441, R.

(142) Ss. 244 and 586—Appeal against order passed under S. 244, Civ. Pro. Code, in execution of Small Cause Court decree—See SMALL CAUSE COURT DECREE, No. 2, 11 C.W.N. 861.

(143) S. 245 B—Insolvency Act (St. 11 and 12 Vic. c. 2), Ss. 13 and 49.

The provisions of S. 49 of the Insolvency Act (Statute 11 and 12, Vic. c. 21), are not directory

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

or imperative, but merely permissive; and even after a vesting order has been made and the schedule of the Insolvent has been filed, the Court has power, under S. 245 B of the Code, to direct execution against the person of the defendant by his arrest and imprisonment, in cases of fraud or misconduct, although the amount of the judgment debt is fully admitted by the insolvent in his schedule. **Bhasker Waman Ranade v. Shridhar Krishna Kothavle**, 9 Bom. L.R. 898.

TYABJI, J.

(144) S. 248—Prayer for issue of notice in a defective application for execution—Limitation Act, Art. 179—Step in aid of execution—See LIMITATION ACT, No. 132, 116 P.R. 1907.

(144-a) S. 248—Date of issuing notice, meaning of—See LIMITATION ACT, No. 140, 1 M.L.T. 395=16 M.L.J. 548=30 M. 30.

(145) S. 248—See No. 111, *supra*.

(145-a) S. 252—Execution of decree against legal representatives—Property of deceased exempt form attachment—Whether representative personally liable.

In this case the counsel, for the decree-holder petitioner, contended that, under S. 252 of the Code, the decree might be executed against the property of the representatives of his debtor other than that inherited from the latter, for the reason that the latter property was not liable to be sold in execution of decree because of the Land Alienation Act. *Held*, the petitioner could not acquire any personal right against the representatives for the mere reason that the Land Alienation Act deprived him of the right of selling the property of his deceased debtor come into the hands of the representatives. **Ram Gopal v. Harjas**, 123 P.R. 1906=62 P.L.R. 1907.

REID, C.J.

(146) Ss. 253, 545 and 549—Surety for due performance of appellate decree, liability of, to be proceeded against in execution.

On appeal by defendant from a decree against him, he applied, under S. 545 of the Code, for stay of execution, when security was given by certain persons as sureties on his behalf. The decree was confirmed in appeal and the plaintiff-decree-holder took out execution against the said sureties of the defendant-judgment-debtor. The application for execution was rejected by the lower Courts on the ground that the plaintiff should proceed against the

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

sureties by way of separate suit, and not on execution.

On revision, the question was referred to the Full Bench, whether a surety, who had given security, under S. 545 of the Code, for due performance of such decree or order as may ultimately be binding upon him, could be proceeded against summarily in execution of decree, or whether the proper remedy against him was by way of separate suit. *Held*, that no distinction could be drawn between the case of surety who, before the passing of a decree in an original suit, has become liable as such for the performance of the same, as well as, that of a surety who has given security for the costs of an appeal, both of whom might be proceeded against in execution, under Ss. 253 and 549 of the Code, respectively, and a surety who has given security, for the performance of the appellate Court's decree, under S. 545 of the Code, who could, therefore, be as well proceeded against summarily in execution as the other sureties above referred to. **Raghar Das v. Salig Ram**, 109 P.R. 1906 (F.B.)=1 P.L.R. 1907.

CHATTERJI, RATTIGAN and CHITTY, JJ.

References:—77 P.R. 1895, overruled; and 22 C. 25, Diss.

(147) S. 257 A—Execution of decree—Agreement varying or satisfying decree.

Held, by the Full Bench, Robertson, J. dissentente (overruling 88 P.R. 1904), that agreements under S. 257 A of the Code are not void for all purposes, but merely for the purpose of execution.

Per Robertson, J.—That the provisions of S. 257 A, second part, are of general application, and not restricted to operations in the execution of the decree only to which the agreements in question refer. **Atma Singh v. Banke Rai**, 61 P.L.R. 1907 (F.B.)=71 P.W.R. 1907.

CLARK, C.J., and REID, CHATTERJI, RATTIGAN, LAL CHAND and ROBERTSON, JJ.

(148) S. 257 A—Agreement for the satisfaction of judgment-debt in excess—Agreement void if made without sanction of Court—Judgment-debt included with other debts in a mortgage-deed—Deed void only to the extent of judgment-debt—See CONTRACT ACT, No. 11, 9 Bom. L.R. 950=31 B. 552.

(149) S. 257 A—Agreement to give time for satisfaction of judgment-debt—See Agent, No. 1, 6 C.L.J. 639.

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

(150) *S. 258, scope of—Applicability to foreclosure-decrees—Execution of decree.*

S. 258 cannot be confined in its operation to the adjustment of money-decrees alone. It is applicable to all decrees alike, whether for money or for foreclosure (which was the case in this particular instance) or any other kind of decree. **Lachu v. Kishen Lal**, 44 P.R. 1906=82 P.L.R. 1907.

ROBERTSON and CHITTY, JJ.

References.—5 C. 786 and 25 C. 718, *F.*, 22 M. 183 and 25 M. 412, *Diss.*

(151) *S. 258—Adjustment out of Court, unless certified, not a bar to execution.*

The Court is not bound to take account of an adjustment of a decree out of Court, by agreement to receive a smaller sum in entire satisfaction of the decree-amount, if such adjustment is not certified, under S. 258 of the Civ. Pro. Code. **Yeerappa Chettiar v. Arumugam Poosari**, 17 M.L.J. 527.

WALLIS and MILLER, JJ.

References.—21 M. 409, 29 M. 312, *F.* 21 M. 356, *Doubted.*

(151-a) *S. 258—See No. 96, supra.*

(152) *S. 266 (1)—Annual hereditary allowance—Liability to be attached.*

A hereditary right to an allowance payable annually from the *melwaram* of a certain estate is attachable in execution of a decree (a).

The defendant, who has in his affidavit admitted that he has a hereditary right to the allowance, cannot plead, in second appeal, that the allowance is only a voluntary grant. **Vaidyanatha Sastriar v. Eggia Venkatarama Dikshathar**, 17 M.L.J. 373=30 M. 279=2 M. L.T. 388.

BENSON and WALLIS, JJ.

Reference.—(a) 9 M.L.J. 113, *F.*

(153) *S. 266 (n)—Attachment—Agriculturist judgment-debtor—Attachment of fodder—Punjab Land Revenue Act—Reference to Collector.*

As regards fodder for cattle belonging to an agriculturist judgment-debtor, S. 266, cl. (n) of the Code taken with S. 70, Land Revenue Act, makes it clear that the Civil Court can attach only so much as will leave, in the opinion of the Collector of the District, to whom a reference must be made, a sufficiency for the owner's cattle calculated according to the rules of his

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

department. **Gur Bakhsh v. Khairati**, 82 P.R. 1907.

CHATTERJI and JOHNSTONE, JJ.

Reference.—93 P.R. 1904, *overruled.*

(154) *Ss. 268, 285 and 490—Attachment before judgment of debt due to judgment-debtor—Decrees of Small Cause Court and Original Court—Payment by debtor of judgment-debtor into Small Cause Court—Voluntary payment—Liability of debtor to pay again—Effect of S. 490 of the Code.*

A person had two decrees passed against him, one by Small Cause Court and the other by Munsiff's Court, both being preceded by attachment before judgment of a debt due to him. The debtor of the judgment-debtor paid the amount of the decree of the Small Cause Court, notwithstanding a notice issued by the Munsiff's Court, prior to attachment after decree in Small Cause Court, to pay the amount of its decree. *Held* that the payment into the Small Cause Court was a voluntary payment, at his own risk, in a Court of inferior jurisdiction, with a full knowledge of the attachment by the higher Court. There was therefore no 'realization' of the money paid by the debtor into the Small Cause Court, in the proper sense of the term, by that Court. He was therefore liable to pay the amount once again.

The effect of S. 490, Civ. Pro. Code, is to put a person attaching before judgment in the same position as if he had attached, after decree, if decree is passed in his favour after attachment before judgment. **Ramasawmy Udayar v. Chakrapany Chettiar**, 17 M.L.J. 488.

SUBRAHMANIA Aiyar, J.

(155) *Ss. 274 and 503—Court's power to appoint receiver—See TRANSFER OF PROPERTY ACT, No. 8, 2 M.L.T. 167=17 M.L.J. 201=30 M. 255.*

(156) *S. 278—Attachment in execution of decree—Executing Court suo moto refusing to attach property—Material irregularity—Mutation not conclusive proof of ownership.*

Held, that, where a decree-holder applies for attachment of certain property as belonging to his judgment-debtor, the Court executing the decree cannot *suo moto* refuse to attach it on the ground that it does not belong to the judgment-debtor, and that the proper procedure is to allow attachment and in the case an

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

objection be filed by a claimant under S. 278, C.P.C., to decide it in accordance with law. **Diwan Chand v. Mer Khan**, 18 P.W.R. 1907.

LAL CHAND, J.

(156-a) S. 278—Order dismissing application made under S. 278 of the Code for default—Order passed without an investigation—Applicability of Act II of the Limitation Act—See LIMITATION ACT, No. 51, 17 M.L.J. 554.

(156-b) S. 278—See No. 129, *supra*.

(157) Ss. 278 and 280—Execution of decree—*Suit for declaration that property sought to be attached belongs to judgment-debtor—Procedure.*

Where a judgment-creditor, seeking execution against property alleged to be of the judgment-debtor, is met with a plea that the property in question is not the property of the judgment-debtor, the judgment-creditor is not obliged to take proceedings under section 278 and wait until an adverse order is passed in those proceedings but may at once institute a regular suit for a declaration that the property sought to be taken in execution is the property of the judgment-debtor. **Makbul Fatima v. Lalta Kunwar**, A.W.N. (1907), 207=4 A.L.J. 574.

KNOX, C.J., and DILLON, J.

References :—18 A. 410, 23 B. 266, *F* ; 16 A. 165, A.W.N. (1904), 190, *D*.

(158) Ss. 278, 373 and 647—Application for removal of attachment—Subsequent withdrawal without consent of Court—Suit for declaration, not barred.

Where the plaintiff first put in a petition under S. 278 for removal of attachment of certain property, and then withdrew it without permission of the Court, *held* that S. 373 of the Code read with S. 647, is no bar to a fresh suit for a declaration of his right to the attached property. **Supal Panday v. Sukkhu Koiri**, 4 L.B.R. 75.

IRWIN, J.

(159) Ss. 278, and 498—Attachment of perishable property—Sale while proceedings for removal of attachment are pending—Disposal of sale proceeds.

Where moveable property under attachment is sold to prevent waste or deterioration, and where at the time there are pending proceedings for removal of attachment taken under S. 278, the sale proceeds should be kept in deposit

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

and should be taken to represent the property that has been sold, and they should follow the result of the order passed in the removal of attachment proceedings. **Ma Kyin v. Mutu Raman Chetti**, 4 L.B.R. 16.

HARTNOLL, J.

(159-a) S. 280—See No. 157, *supra*.

(160) S. 283, *Suit under—Valuation of suit—Jurisdiction—S. 12, Madras Civil Courts Act, 1873.*

Where the suit is one for getting rid of the effect of the order disallowing the claim of the plaintiff to the property when it was attached in execution of the money-decree obtained by the defendants Nos. 1 and 2 against the third defendant, and where, though the judgment-debtor is impleaded as a third defendant, the plaint contains no statement of any cause of action as against him for declaration as to the plaintiff's title to the property, the suit must be held to be one for declaration of the plaintiff's right rendered necessary by the order passed against him allowing the attachment at the instance of defendants Nos. 1 and 2; and the valuation of the subject-matter of the suit should, on principle, be taken to be the amount for which the attachment was made, if the same is less than the value of the property (a).

Where there is no allegation in the plaint that the judgment-debtor was, in fact, a party to the claim proceedings, he cannot, in point of law, be considered a party to it (b). **Krishnasawmi Naidu v. Somasundram Chettiar**, 17 M.L.J. 95 (F.B.)=2 M.L.T. 116=30 M. 335.

SUBRAHMANYA AIYAR, BENSON and MILLER, JJ.

References :—(a) 17 A. 69, *D*. (b) 25 M. 721, *R* ; 16 M.L.J. 136, *commented upon*.

(161) S. 284—Execution of compromise decree—See COMPROMISE DECREE, No. 4, 6 C.L.J. 95=11 C.W.N. 879=34 C. 886.

(162) Ss. 284 and 285—Execution of decree—Attachment by two Courts of different grades—Sale by Court of lower grade, validity of—Statute, construction of—Jurisdiction.

Where the same property is under attachment by two Courts of different grades, a sale effected by the Court of a lower grade is not a nullity, and a valid title passes to the purchaser (a).

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

S. 285, Civ. Pro. Code, is directory and deals with procedure. It is not intended by this section to take away the jurisdiction conferred by S. 284 of the Civ. Pro. Code.

It must be shown by the clearest language that jurisdiction given by one section of the Act has been taken away by another and subsequent section. **Gopi Chand Bothra v. Kase-munnessa Khatun**, G. C. L. J. 130 = 34 C.836.

MACLEAN, C.J., and HOLMWOOD, J.

References :—(a) 12, C. 332, 12 C. 317, 19 C. 651, 25 C. 46, 22 B. 88, 22. M. 295, R.

(162-a) S. 285—See Nos. 154 and 162, *supra*.

(163) Ss. 287, 295 (b), 311, 313 and 622—*Execution sale of mortgaged property—Mortgagee's right to have property sold free of mortgage—Discretion of Court—High Court's powers of interference under S. 622.*

Where property liable to be sold in execution is subject to a mortgage, the law gives no right to the mortgagee to have the property sold free of his mortgage, giving him the same rights against the sale proceeds as he has against the property. It is left to the discretion of the Court to make an order under cl. b of S. 295. If his mortgage is not inserted in the proclamation of sale, his interests are in no way affected. If his mortgage is a good one, the Court cannot affect his rights over the property, even if it sells the property as being unincumbered. This being so, the Chief Court should not exercise its revision powers on behalf of a mortgagee, even when there has been material irregularity in not settling forth in the sale proclamation anything about his mortgage. Still less should the Court interfere to order an enquiry, which a mortgagee cannot claim, or to order a Court to act under S. 295 (b). **Hla Baw v. S. K. R. Muthiah Chetty**, 3 L.B.R. 275.

FOX, C.J., and IRWIN, J.

References :—2 L.B.R. 333, R; 4 M. 383, 13 C. 225, 9 M. 508, 15 M. 372, 6 B. 582, 584, cited.

- (164) Ss. 287 and 311—*Sale proclamation, place for sale fixed in—The conducting of the sale elsewhere a material irregularity.*

In this case, contrary to the express order of the Court to sell the property in question at the premises, the sale proclamation advertised the sale to take place at the Court-house and the sale was in fact conducted at the premises of some of the buildings advertised for the sale.

Held, this was a serious irregularity, which

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

may well be presumed to cause substantial injury by keeping away bidders and an irregularity empowering the Court to set aside the sale under S. 311 of the Code, under which proof of substantial loss was not essential; and further, the mistake in the sale proclamation in question, as regards the place of sale, would, in the ordinary course of events, result in causing injury to the person, whose property was advertised for sale. **Duni Chand v. Atma Singh**, 132 P.R. 1906 = 11 P.L.R. 1907.

LAL CHAND, J.

References :—22 A. 140, 23 M. 227 (P.C.), 24 C. 291, 33 C. 1, 32 C. 542, 20 A. 412 and 30 P.R. 1899, R.

(165) S. 291—*Stay of proceedings—Fresh proclamation necessary after each stay.*

Under S. 291 of the Code, when the stay of proceedings is removed, a fresh proclamation ought to be issued, in compliance with the terms of that section. When such a proclamation has not been issued, the judgment-debtor's remedy is to object to the confirmation of the sale, and not to impeach the sale by regular suit. **Gujrajmati Teorain v. Saiyid Akbar Husain**, 9 Bom. L.R. 83 (P.C.) = 2 M.L.T. 47 = 5 C.L.J. 138 = 11 C.W.N. 393 = 17 M.L.J. 112 = 29 A. 196.

LORD MACNAGHTEN, LORD ATKINSON, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

(165-a) S. 291—See Nos. 130, 131 and 132, *supra*.

(166) S. 295—*Decree against two principal-debtors and surety—Decree against principal-debtors alone for larger sum—Partial satisfaction of decree against the principal-debtors alone by rateable distribution—Extent of surety's liability—See PRINCIPAL AND SURETY, No. 1, 2 M.L.T. 30 = 30 M. 167.*

(167) S. 295, *provisos (a and b)—Execution sale of property "subject to mortgage" and "free from mortgage"—Procedure.*

Where a decree-holder desires that the mortgaged property be sold free of the mortgage and that the mortgagee should have the first claim on the sale proceeds, the consent of the mortgagee is required under S. 295, proviso (b), and the Court should issue notice to the mortgagee to ascertain whether he assents. If the property is to be sold free of the mortgage and the mortgage is to be extinguished out of the sale proceeds, there is no reason why the purchase,

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

should know anything about the mortgage, and the sale proclamation, therefore, ought not to contain any reference to the existence of the mortgage. If, on the other hand, the sale should be "subject to the mortgage," care should be taken that the proclamation is properly worded and that the bailiff explains to bidders that he is only selling the judgment-debtor's right to redeem, and that the mortgagee still retains his right to realise his money by sale of the property. **Shwe Seik v. M. A. R. Somasundram Chetty**, 3 L.B.R. 258.

IRWIN, J.

(167-a) S. 295 (b)—See No. 163, *supra*, and No. 175, *infra*.

(168) Ss. 295 (c) and 311—*Sale in execution of mortgage decree—Sale continued after realisation of mortgage amount—Rights of prior decree-holders in surplus sale proceeds—Illegality.*

Where property subject to a mortgage is sold in execution of the mortgage decree, and there are other decree-holders, who have, prior to the sale, applied to the Court to execute their decrees and had even attached the mortgaged property, it cannot be contended that the sale ought to have been stopped as soon as the amount of the mortgage decree was realised and that the sale of the rest of the property was illegal. The sale by the Court must be held to have been in execution of those decrees, in accordance with the other decree-holder's application as well as in execution of the mortgage decree. S. 295 (c) contemplates such a case. **Yenkatarama Sastriar v. Mangalathammal**, 17 M.L.J. 80.

BENSON and WALLIS, JJ.

(169) Ss. 295 and 622—*Revision, where Court fails to exercise jurisdiction—Rateable distribution, application for—"Same judgment-debtors," meaning of—Right of decree-holders to rateable distribution in case where decrees against estates of different persons but where same persons are judgment-debtors.*

Held, that, in order to claim a rateable distribution under S. 295 of the Code, it is not necessary that the two decrees should have been passed precisely against the same judgment-debtors, but that the test is whether the applicant for a rateable share and the person in execution of whose decree assets have been realised have both applied for execution against

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

the same judgment-debtor. **Ikbāl Jahan Begam v. Munney Mirza**, 10 O.C. 129.

SCOTT, J.C., and CHAMBER, A.J.C.

References:—8 O.C. 86, 30 C. 583, 26 M. 179, R.

(170) Ss. 305, 310-A, 311 and 312—*Sale in execution of money-decree—Time given to the judgment-debtor to raise money by private alienation—Validity—Revision—S. 70, cl. (a) of Punjab Courts Act.*

Where, after auction-sale of immoveable property in execution of a money-decree, the judgment-debtor applied for time, under S. 305 of the Code, to enable him to raise the amount of the decree by mortgage of the property sold by auction, *held* that the executing Court had no power to grant the application under that section. The executing Court was bound, under the imperative provisions of S. 312, to pass an order confirming the sale, if the sale is not set aside before the expiry of the period of limitation prescribed for applications under Ss. 310 A and 311 of the Code (a).

Where the lower Appellate Court, in upsetting the order of execution of the lower Court, had acted upon a complete misapprehension of the powers of an executing Court, and wholly disregarded the imperative provisions of law, *held* that the irregularity warranted the interference of the Chief Court on revision, under S. 70, cl. (a) of the Punjab Courts Act. **Girdhari Lal v. Bhago**, 92 P.R. 1907.

SHAH DIN, J.

References:—(a) 24 C. 682, 31 C. 1011, R.

(170-a) S. 310—See No. 66, *supra*.

(171) S. 310 A—*Order under—Refusing to accept a deposit—Appeal.*

An order under S. 310 A of the Civ. Pro. Code, refusing to accept a deposit, is an order in execution of the decree, within the meaning of S. 244 (c) of the Code, and an appeal lies from such an order. **Imtiaz Begam v. Dhuman Begam**, 4 A.L.J. 135 = A.W.N. (1907), 64 = 29 A. 275.

KNOX and RICHARDS, JJ.

References:—19 A. 140, not followed; 26 A. 447 and 28 C. 78, R.

(172) S. 310 A—*Sale in execution—Deposit to set aside—"Person whose immoveable property has been sold"—An under-riyat under the judgment-debtor—Locus standi.*

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

An under-raiyat can apply under S. 310-A, Civ. Pro. Code, as being a person, whose immoveable property has been sold in execution of a decree for arrears of rent due in respect of the superior holding (a). **Chandra Kumar Nath v. Kamini Kumar Ghose**, 11 C.W.N. 742.

MACLEAN, C.J., and FLETCHER, J.

References :—(a) 32 C. 107 ; 29 C. 1 (F.B.) ; 8 C.W.N. 55 ; 8 C.W.N. 232, *F. in Principle* ; 29 C. 459, *dissented from*.

(172-a) S. 310A.—See Nos. 133, 134 and 170, *supra*.

(179) *Ss. 310A and 311*—"Applies," meaning of—Presentation of an application to the Munsarim—Withdrawal of application before order passed—Making of application when deemed to be complete.

Held that, where an applicant presented an application under S. 311, Civil Procedure Code, to the Munsarim of the Court, and, before the Court passed an order on it, he applied to withdraw the application and the application was consequently withdrawn, the applicant should be held to have withdrawn his application before the making of it was complete, should not be considered to have applied under S. 311, and should be held to be entitled to make an application under S. 310A. **Raja Mohammad Sardar Husain Khan v. Sajjad Mirza**, 10 O.C. 141.

CHAMIER and SANDERS, A.J.CS.

Reference :—5 O.C. 137, *Appr.*

(174) *Ss. 310A and 316*—Scope of S. 310A "Person whose immoveable property has been sold"—Sale by judgment-debtor after auction sale but before confirmation.

Under S. 316, Civ. Pro. Code, title does not pass to the purchaser until the sale in execution of a decree is confirmed, and, until confirmation, it is open to the judgment-debtor to transfer his interest so as to entitle the party, to whom the interest is transferred, to apply under S. 310A. The words "person whose immoveable property has been sold" in S. 310-A, includes cases where a person purchases immoveable property from the judgment-debtor, after the auction sale, but before the expiration of 30 days and before confirmation. **Appaya Chetti v. Kanhall Beari**, 17 M. L. J. 127 = 30 M. 214.

WHITE, C.J., and MILLER, J.

References :—26 M. 365, *F.* ; 1 C.W.N. 279, *Diss.*

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

(175) *Ss. 310A, 320, 295 and 244(c)*—Decree—Execution—Application by another decree-holder under S. 295 for rateable distribution—Execution proceedings transferred to the Collector—Sale of property by Collector—Judgment-debtor applying to set aside the sale—Deposit in Court of the decretal amount and five per cent. of purchase money—Refusal to set aside the sale—Appeal—Confirmed sale can be set aside—Collector's power to set aside the sale.

C, a decree-holder, in execution of his decree, attached certain properties belonging to his judgment-debtor. H, another decree-holder against the same judgment-debtor, applied to execute his decree and prayed for rateable distribution under S. 295 of the Code. The execution proceedings were transferred to the Collector under S. 320 of the Code. The properties were sold by the Collector in execution of C's decree. Within thirty days of sale, the judgment-debtor applied under S. 310A of the Code to set aside the sale, and deposited in Court five per cent. of the purchase money as well as the decretal amount specified in the proclamation of sale. The Subordinate Judge declined to set aside the sale, inasmuch as the judgment-debtor had not deposited also the amount due under H's decree. The judgment-debtor appealed, but the District Judge dismissed the appeal on the ground that no appeal lay.

On appeal to the High Court, it was contended (1) that no appeal lay ; (2) that inasmuch as the execution proceedings had been referred to the Collector, S. 310A of the Code had no application, and (3) that the judgment-debtor could not apply under S. 310A, because the sale had already been confirmed by the Collector.

Held, (1) that an appeal would lie from an order under S. 310A of the Code, where the case fell under S. 244 (c) of the Code (a) ;

(2) that the Code conferred no power on the Collector to set aside a sale under S. 310A nor was there any rule vesting that power in the Collector. The power to act under S. 310A continued in the Court, notwithstanding the transfer of execution to the Collector ;

(3) that there was nothing in S. 310A which precluded the Court from setting aside the sale, merely because it had been confirmed ;

Civ. Pro. Code (Act XIV of 1882).—(Contd.). **Civ. Pro. Code (Act XIV of 1882). (Contd.).**

(4) that it was erroneous on the part of the Subordinate Judge to hold that it was incumbent upon the judgment-debtor to deposit in Court anything except that, for which S. 310A has made provision. **Pita Moti v. Chunilal Harakchand**, 9 Bom. L.R. 15=31 B. 207.

JENKINS, C.J., and BEAMAN, J.

Reference:—(a) 25 B. 418, *qualified*.

(176) *S. 311—Execution-sale—Holding the sale at an earlier hour than that mentioned in proclamation—Material irregularity—Onus of proof.*

An execution-sale held at an earlier hour than that notified in the proclamation of sale is not void, but is only a material irregularity. The person affected by such sale may apply, under S. 311 of the Code, to set aside the sale. But in order to succeed in his application, he must prove that substantial injury resulted from the irregularity. **Karathan Chetti v. Palaneappa Chetti**, U.B.R. (1907), Civil Procedure, 9.

SHAW, J.C.

References:—7 A. 289, 676; 21 C. 66, 24 C. 291, 20 M. 159, 14 W.R. 320, 25 W.R. 328, 10 I.A. 25 (P.C.), 15 I.A. 171 (P.C.)=12 M. 19, 27 I.A. 216 (P.C.)=23 B. 337 and 6 C.W.N. 48, R.

(177) *S. 311—Suit to set aside sale held under Act I of 1895 (Bengal) on the ground that there were irregularities in the certificate proceedings—See ACT I OF 1895 (PUBLIC DEMANDS RECOVERY), No. 8, 5 C.L.J. 240=2 M.L.T. 158 (F.B.).*

(177-a) *S. 311—See Nos. 74, 132, 135, 163, 164, 168, 170 and 173, supra.*

(178) *Ss. 311, 312 and 313—Execution of decree—Sale in execution—Objection subsequently taken by the judgment-debtor that the property sold was not legally saleable—Estoppel.*

Held that a judgment-debtor, who might have raised objections to a sale in execution of a decree against him, but who has refrained from doing so, and who might have appealed against the order for sale, has no right, after the sale has been carried out, to prefer an objection that the property sold was not legally saleable. **Umed v. Jas Ram**, A.W.N. (1907), 193=4 A.L.J. 519=29 A. 612.

AIKMAN, J.

References:—7 A. 641, 26 C. 727, F.

(179) *Ss. 311, 312 and 588 (2)—Application of judgment-debtor for re-sale dismissed for*

default—Further application for review, dismissal of—Right of appeal—Ordering re-sale without fresh proclamation, validity of.

Where, in execution of a decree, an auction sale was confirmed under S. 312 in the absence of objection under S. 311, and an application made *thereafter* to set aside the sale was dismissed for default and, thereupon, another application was made on behalf of the judgment-debtor, asking (a) that the dismissed application be restored or (b) that this be treated as a fresh application to set aside the sale or (c) that this be treated as an application for review, but was also rejected, no appeal lies against either of the orders of dismissal, inasmuch as they do not come either under S. 588 (16) or under S. 312.

The action of the Court in setting aside the sale under a decree and then proceeding to sell the property without fresh proclamation is illegal. **Bishambar Das v. Udho Ram**, 25 P. R. 1907.

JOHNSTONE, J.

(180) *Ss. 311 and 588—Appeal from an order dismissing the application in default.*

Held, that no appeal lies from an order dismissing for default an application to set aside a sale under S. 311, Civil Procedure Code. **Sripal Singh v. Pandit Raten Lal and Maiku Lal**, 10 O.C. 171.

SANDERS and GREEVEN, A.J. CS.

References:—5 O.C. 294, F; 10 M. 270, R.

(181) *S. 312—Execution sale, confirmation of—Effect of confirmation—See EXECUTION SALE, No. 2, 4 L.B.R. 40.*

(181-a) *S. 312—See Nos. 136, 170, 178 and 179, supra.*

(181-b) *S. 313—See Nos. 168 and 178, supra.*

(182) *S. 315—Decree-holder not bound to repay purchase money, when sale is set aside, until called upon by purchaser to do so—See LIMITATION ACT, No. 123, 17 M. L. J. 194=30 M. 209.*

(183) *S. 316—Decree reversed, before sale confirmed—Effect of.*

Where property is sold in execution of a decree, but, before the sale certificate is issued, the decree, under which the sale took place, is reversed, the title to the property does not vest in the purchaser. A Court, therefore, should

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

hold its hand and refuse to grant a certificate, if, before it is issued, the decree is set aside. A person, whose property has been sold, is, in such case, entitled to his property, and not the purchase money. **Ram Sukh v. Ram Sahai**, 4 A.L.J. 486 = A. W. N. (1907), 198 = 29 A. 591.

AIKMAN, J.

(188-a) S. 316—See No. 174, *supra*.

(184) S. 317—*Certified purchaser—Interpretation.*

The words "certified purchaser" in S. 317, include the person standing in the shoes of the Court purchaser. **Hari Govind Joshi v. Ramachandra Narayan**, 8 Bom. L.R. 873 = 31 B. 61.

ASTON and HEATON, JJ.

References:—8 M. 511, 21 A. 196, 26 C. 509 and 14 M.I.A. 496, R.

(185) S. 317—*Joint decree—Purchase at sale in execution by one decree-holder—Suit for declaration that property purchased was joint.*

In execution of a joint decree on a mortgage, one of the decree-holders obtained leave to bid at the auction sale and purchased the mortgaged property for the exact amount of the decree, namely, the mortgage debt, interest and costs. Satisfaction of the decree was entered up and the purchaser took possession of the property. *Held* that section 317 did not preclude the other joint decree-holder from suing for a declaration that the property so purchased was the joint property of himself and the actual purchaser. **Achhalbar Dube v. Tapas Dube**, A.W.N. (1907), 166 = 29 A. 557.

RICHARDS, J.

Reference:—12 B.L.R. 317, R.

(186) S. 318—*Application under, made by auction-purchaser rejected as made beyond time, no bar to suit for possession of property purchased—See EXECUTION OF DECREE, No. 8, A.W.N. (1907), 131 = 4 A.L.J. 434 = 29 A. 463.*

• (186-a) S. 318—See Nos. 137 and 138, *supra*.

(187) S. 320—*Decree—Execution—Execution transferred to Collector—Partial execution—Application for instalments—Limitation Act (XV of 1877). Art. 175 See ACT XVII OF 1879 (DEKHAN AGRICULTURISTS' RELIEF, BOMBAY, No. 4, 8 Bom. L.R. 963 = 31 B. 120.*

(187-a) S. 320—See No. 175, *supra*.

(188) Ss. 320 and 325 A—*Ancestral property—Execution of decree—Property taken under*

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

management of the Collector—Disabilities of proprietor pending term of management.

In pursuance of the powers conferred upon him by rules framed by Government under S. 320 of the Code of Civil Procedure, the Collector sanctioned a lease of certain zamindari property of the judgment-debtor for a period of seventeen years, the lease being executed in the name of the judgment-debtor, but with the permission of the Collector.

Held, that the disabilities imposed by the first paragraph of S. 325-A of the Code affected the judgment-debtor during the pendency of such lease; and, *semble*, that such disabilities continued, so long as any of the debts, for the satisfaction of which the judgment-debtor's property was taken under management by the Collector, remained unpaid. **Ganga Prasad v. Ganga Bakhsh Singh**, A.W.N. (1907), 112 = 29 A. 415.

STANLEY, C.J., and BURKITT, J.

(189) S. 325 A—*Judgment-debtor and his representative—Incompetency to alienate.*

The incompetency to alienate, fastened on the judgment-debtor and his representative in interest, by S. 325 A of the Code, is a personal disqualification, and one which operates to make every alienation in contravention of the provisions of that section absolutely void, and of no effect against any person whatsoever. **Murray v. Murat Singh**, 3 N.L.R. 171.

STANYON, A.J.C.

References:—4 C.P.L.R. 156, *Diss.* 1 C.P.L.R. 23, D; 30 C. 539; 17 C. P. L. R. 13; 25 A. 195, R.

(189-a) S. 325-A—See No. 188, *supra*.

(190) Ss. 328, 331 and 622—*Obstruction to execution of decree—Application by decree-holder for removal of obstruction—Rejection of application—Appeal—High Court—Revisional jurisdiction.*

A decree-holder made a complaint, under S. 328 of the Code, to the Judge who, holding that the matter came under S. 331 of the Code, without registering the claim as a suit and without making any enquiry, rejected the complaint.

Held, the order was not appealable; but it was one which could be dealt with by the High Court under the powers conferred upon it by

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

S. 622 of the Code (a). **Vishnu Ramchandra v. Ramchandra Yeshwant**, 9 Bom. L.R. 986.

RUSSEL, A.C.J., and HEATON, J.

References.—(a) 14 C. 235, 16 M. 127, *Diss.* (191) S. 331—*Execution of decree—Claim by person other than judgment-debtor—Inquiry.*

S. 331 of the Code is in imperative terms, and in all cases in which its provisions are applicable they must be given effect to. In execution of a decree for possession of immoveable property, a person other than the judgment-debtor in possession of property objected to the execution, alleging, in good faith, some title to the property. Meanwhile, execution was stayed pending a suit by the mortgagee of the judgment-debtor. Therefore the Court did not pass any order on this petition. The order staying the execution being withdrawn, the District Judge before whom the petition was pending ordered the execution of the decree, on the ground, that the petitioner was no longer in possession of the property, he having been temporarily absent.

Held, on revision by the Chief Court, that the petitioner's objection, having been preferred in good faith, should have been made the subject of proper inquiry under S. 331. His temporary absence could not affect his claim. **Sundar Doss v. Raja Baldeo Singh**, 118 P.R. 1907.

RATTIGAN, J.

(191-a) S. 331—See Nos. 28 and 190, *supra*.

(192) Ss. 331 and 244—*Obstruction, to execution of decree, by a person other than a judgment-debtor—S. 244—Applicability of.*

A person, against whom no decree was passed, is not a judgment-debtor. And, when obstruction to the execution of a decree is caused by any person other than the judgment-debtor, the decree-holder's application to remove the obstruction should be registered as a suit under S. 331. S. 244 does not apply to such a case, **Jathavedan Nambudri v. Kunju Achan**, 16 M.L.J. 438=2 M.L.T. 34=30 M. 72.

SUBRAHMANTIA IYER and MILLER, JJ.

References.—22 M. 161, not F., and 23 M. 391, D.

(193) Ss. 331 and 332—*Decree for delivery of possession of the immoveable property—Obstruction to delivery by third party in good faith—His remedy.*

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

S. 331 of the Code contemplates an application by the decree-holder; and a third party resisting the delivery of possession of property to a decree-holder cannot apply for the investigation of his claim under this section, but may do so under S. 332 of the Code after he has been dispossessed. **Sukhan Singh v. Balj Nath Goenka**, 12 C.W.N. 115.

WOODROFFE and COXE, JJ.

(194) S. 332—*Decree—Execution—Khatedar—Non-payment of Government Assessment—Forfeiture—Re-letting—Person other than the judgment-debtor.*

S obtained a decree for possession against his tenant P. P thereafter made default in payment of the Government assessment. The lands were consequently forfeited to Government; and were again let to P under a *Kabulayat*. S then, in execution of his decree, recovered possession of the lands from P. P applied, under S. 332, C.P.C., to get back the lands. The lower Court granted P's application.

Held that it was erroneous to speak of P as a person other than the judgment-debtor: he was the judgment-debtor and none the less so because he might have acquired an interest subsequent to the date of the decree passed against him.

Held, further, that P could not rely on his new title as an answer to S's claim for possession, for P had, by availing himself of his position as *Khatedar*, gained an advantage in derogation of the rights of S. **Shripati Kundlik v. Piraji Pattojli**, 9 Bom. L.R. 1018.

JENKINS, C.J., and HEATON, J.

(194-a) S. 332—See No. 193, *supra*.

(195) Ss. 332 and 372—*Assignment pendente lite—Addition of assignee as co-defendant after the period of Limitation—See LIMITATION ACT, No. 88, 3 P.R. 1907=42 P.W.R. 1907.*

(196) S. 335—*Auction-purchaser—Resistance to his taking possession—Enquiry—Application dismissed for default—Regular suit—Limitation—Limitation Act (XV of 1887), Sch. II, Art. 11.*

When an application under S. 335, Civ. Pro. Code, came on for hearing, the applicant asked to withdraw his application for want of evidence, and the opposite party being present, the Court directed the application to be dismissed "for default of prosecution" with costs.

Civ. Pro. Code (Act XIV of 1882).—(Contd.)

Held, that, no enquiry having been held within the meaning of S. 335, Civ. Pro. Code, the applicant was not precluded from bringing a regular suit to establish his claim, more than a year after the date of the order.

It is a condition precedent to passing an order under S. 335, Civ. Pro. Code, so as to make it conclusive, unless a suit is brought within a year, that the Court shall enquire into the matter of resistance, etc. (a). **Sarat Chandra Bisu v. Tarini Prosad Pal Chowdry**, 11 C.W.N. 487 = 34 C. 491.

MACLEAN, C.J., and GEIDT, J.

References :—(a) 1 C.L.J. 296, 1 C.W.N. 24, 32 C. 537, D.

(197) S. 335—*Finality—No judicial determination—Limitation Act (XV of 1877), Sch. II, Art. 11—Test—Manager of the joint Hindu family, decree against, binding character of.*

Under S. 335 of the Code, the only order, upon which the character of finality is impressed, is an order made upon enquiry.

Where the matter of the obstruction, about which the purchaser had complained to the Court, was not investigated at all, and where there was no judicial determination as to whether the obstruction did, as a matter of fact, exist or whether the obstruction was justifiable, and the Court, without any enquiry, dismissed the application for default, and the proceeding was withdrawn, the order is not of the description contemplated by S. 335 of the Code, and Article 11, Schedule II of the Limitation Act, has no application (a).

The test to be applied in each case is, whether the order, which is relied upon as a bar, has been made after enquiry or without any investigation (b).

Merely because the claimant does not adduce evidence or is absent, it does not follow that there are no materials before the Court to enable it to enquire into the matter. If the Court does enquire into it and dismisses the application, the order is made upon investigation (c).

If a decree is passed against the *karta* or manager of a joint Hindu family, in respect of a liability properly incurred for the necessities of the family, the binding character of this decree upon the interests of the other members depends, not upon their having or not having been parties to the suit, but on the autho-

Civ. Pro. Code (Act XIV of 1882).—(Contd.)

of the manager to incur the liability (d). **Kunj Behari Lal v. Kandh Prashad Narain Singh**, 6 C. L. J. 862.

MOOKERJEE and HOLMWOOD JJ.

References :—(a) 34 C. 491, *Appr.* 1 C.W.N. 24, *commented on.* (b) 15 I.A. 123 = 15 C. 521, *R. and Expl.* (c) 32 C. 537, *doubted.* (d) 14 B. 597, 23 B. 372, 29 C. 583, 9 C.W.N. 879, R.

(197-a) S. 335—See No. 189, *supra*.

(198) S. 336—*Insolvency—Security for filing application by judgment-debtor to be declared insolvent.*

The petitioner gave security for one Aziz, who had been arrested in execution of a decree. He deposited a sum of money in Court, on condition that, if an application, which was to be made by Aziz within a time specified, to be declared insolvent, was rejected on any ground whatever, the amount deposited would be paid to the decree-holder. The judgment-debtor duly presented his application for a declaration of insolvency, but, before any order could be passed on it, he died. *Held* that the condition of the security was not fulfilled, and the decree-holder was not entitled to the money deposited by the surety. **Ashiq Ali v. Mcti Lal**, A.W.N. (1907), 120 = 4 A.L.J. 437 = 29 A. 466.

RICHARDS, J.

Reference :—24 M. 637, R.

(199) Ss. 345, 351 and 352—*Insolvent—Omission to frame schedule—Creditor's right to sue—Res judicata.*

A list of debts filed under S. 345, prior to a declaration under S. 351, is not a schedule as required by S. 352. It is necessary that the Court should by order determine the persons who have proved themselves to be the insolvent's creditors and their respective debts and then frame a schedule of such persons and debts. In the absence of any such determination by Court, the declaration under S. 351, that the applicant was an insolvent, cannot be deemed to be a decree in favour of the creditor for the amount due to him. And a suit by the creditor is therefore maintainable and is not barred as *res judicata*. **Harya v. Mul Chand**, 64 P.R. 1907.

KENSINGTON and LAL CHAND, JJ.

References :—7 M. 318, F. 76 P.R. 1899, D.

(200) S. 351—*Application by debtor for declaration of insolvency and appointment of receiver—Unfair preference to creditors—*

Civ. Pro. Code (Act XIV of 1882).—(Contd.).*Disposition of property—Bad faith—Test of unfair preference—Presumption.*

Where the object of a compromise entered into by a debtor with some of the creditors was to put an end to ruinous litigation, and not to benefit them, though it may be that the transaction was in fact beneficial to them, such a compromise does not amount to an act of bad faith within the meaning of S. 351.

It is sufficient to constitute an unfair preference, if preferring the creditor was the substantial, effectual or dominant view with which the debtor made the preference, and it is not necessary that it should have been the sole view (a). If a man, on the eve of bankruptcy, makes a payment to a particular creditor, the presumption immediately arises that he makes that payment, with the dominant view of giving a preference to that creditor over his other creditors. There is no need for any evidence that that view was expressed in so many words by the bankrupt; it is a presumption which would arise from the transaction (b). The same principles apply to assignments of "actionable claim" which are "dispositions of property." But where dispositions of property were made by a debtor, not with the dominant view of preferring some of his creditors but with the object that he might continue to receive financial support from such of the creditors, and were made under pressure by these creditors, such circumstances negative a preference being the dominant view with which the dispositions were made. **Angappa Chetty v. Nanjappa Row**, 2 M.L.T. 57.

WHITE, C. J. and MILLER, J.

References:—(a) L.R. 23 Ch. 695, 10 Morrell 15, R. (b) 1 K.B. 710, R.

(200-a) S. 351—See No. 199, *supra*.

(200-b) S. 352—See No. 199, *supra*.

(201) S. 357—Creditor whose debt is not included in the scheduled debt can proceed with the execution of his decree.

A creditor, whose debt has not been included in the scheduled debts, within the meaning of S. 357 of the Code, is entitled to proceed with the execution of his decree against the insolvent's property, notwithstanding his discharge. **Amathial Bhagyandas v. Cursetji Dhanjsha**, 9 Bom. L.R. 466.

DAVAR, J.

(202) Ss. 359 and 622—Imprisonment, simple or rigorous—Order, subsequent, declaring it

Civ. Pro. Code (Act XIV of 1882).—(Contd.).*rigorous, unauthorised, may be discharged under S. 622.*

Imprisonment under S. 359 of the Civ. Pro. Code may be either simple or rigorous. The order must specify the character of the imprisonment; if it omits to do so, the imprisonment must be taken to be simple. A judge after having made an order for imprisonment under S. 359 of the Civ. Pro. Code, cannot, subsequently, by a separate order, declare it to be one for rigorous imprisonment. If he does so, his order is not authorised by any provisions of the Civ. Pro. Code, and may be discharged by the High Court in the exercise of its revisional jurisdiction (a). **Amir Ali v. Mithu Sahu**, 5 C.L.J. 445=11 C.W.N. 740.

MOOKERJEE and HOLMWOOD, JJ.

References:—(a) 18 W.R. Cr. 3, F.

(203) S. 361—Suit by agent of undisclosed principal—Devolution of right to continue suit after agent's death—Rights of principal.

The mere recital of a firm's "vilasom" before the name of the agent in the plaint without its appearing in the cause title does not suffice to make the suit one by the firm or by the agent on behalf of the firm.

Where a suit is one properly brought by a person as agent of an undisclosed principal, it should, after the death of the agent, be continued, if at all, by his representatives, and not by the principal.

The principal's right to sue, when it exists, exists independently of that of the agent and does not devolve upon him or revert to him as a consequence of the agent's death. **Periannan Chettiar v. Rengachi Reddy and Marutha Pillai**, 17 M.L.J. 116.

WHITE, C.J., and MILLER, J.

Reference:—22 B. 672, D.

(204) Ss. 362, 363, 368 and 582—Suit, right of—Substitution, application for.

A, B. and C, members of a joint Hindu Mistakshar family, applied for registration of their names under the Land Registration Act. The application was opposed and refused in 1883. In 1894, they sued for declaration of title and obtained a decree. During the pendency of the appeal against such decree, A died, and more than six months after, the appellant applied to have B and C noted as legal representatives, who had taken the estate by survivorship.

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

Held, that the application for substitution was governed by S. 362, Civ. Pro. Code, and not S. 368. S. 362 is not limited in its application to cases, in which the right of suit survives against the surviving defendants, by reason of some circumstance antecedent to the suit. **Shyamanand Das v. Raj Narain Das**, 4 C.L.J. 568 = 11 C.W.N. 186.

RAMPINI and MOOKERJEE, JJ.

(204-a) S. 368—See No. 204, *supra*.

(205) *Ss. 366, 367 and 588, cl. (18)*—*Abatement of suit—Appeal, right of, from an order declaring a person not to be the legal representative—Joint Hindu family, karta in a, must be with the consent of the adult members—Right of descendants of a karta to carry on a suit brought by him for recovery of a property against the trespasser for the benefit of the whole family.*

One B.N. brought a suit as *karta* of a joint Hindu family to recover possession of certain properties against a trespasser for the benefit of the whole family. During the pendency of the suit, B.N. died and his sons applied to be brought on record as legal representatives of the deceased. The defendant-trespasser opposed the application, on the ground that the sons of the deceased alone could not carry on the suit, as they could not be considered as legal representatives of B.N. as *karta*. The Court below held that the sons of B.N., were not the legal representatives of the deceased in his capacity as *karta* and ordered that the suit should be dismissed as having abated under section 366, Civil Procedure Code. The sons of B.N. appealed against this order. It was contended that no appeal lay against an order passed under section 366.

Held that, although the order passed in the case by the Court below purported to have been passed under the first paragraph of section 366, it ought to be treated as an order under section 367, and was appealable under section 588, cl. (18) (a).

Held, further, that none of the sons of the deceased could claim to carry on the suit as *karta*, inasmuch as no member of a joint family could arrogate to himself the position of *karta* against the wishes of the other adult members.

Held also that, if the other members of the family did not or could not join with the sons of the deceased B.N., in carrying on the suit, they were entitled to carry it on themselves for the

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

benefit of the whole family, by making other members of the family parties to the suit. **Pandit Ikbal Narain v. Pandit Ratan Lal**, 10 O.C. 121.

CHAMIER and EVANS, J. CS.

References :—(a) 10 B. 220, 27 B. 162, 18 M. 496, 2 N.L.R. 7, 17 A. 172, 17 M. 209, 27 M. 112, R ; 9 O.C. 354, *followed*.

(205-a) S. 367—See No. 205, *supra*.

(206) S. 368—*Death of defendant—Application for substituting legal representatives—Delay—Sufficient cause.*

Ignorance of a defendant's death is often a sufficient cause to prevent a suit from abating by reason of the plaintiff not applying for the substitution of legal representatives in the place of the deceased defendant within the period prescribed therefor (a).

Where the defendants live in a different village from the plaintiff and are numerous, held that these are extenuating circumstances in, and sufficient cause for, the delay in bringing the legal representatives on record in the place of the deceased. **Dadu v. Kadu**, 113 P. R. 1907.

JOHNSTONE and LAL CHAND, JJ.

References :—(a) 42 P. R. 1887, 43 P. R. 1889, R.

(206-a) S. 368—*Application to bring on record the representative of a deceased defendant—Death of the defendant before the presentation of the plaint—Jurisdiction of Courts to substitute his legal representatives.*

Although the rule, that, on the death of the defendant, the action abated and the Court lost jurisdiction over it, was abolished in England by the Common Law Procedure Act, it is still retained in a modified form in the Civ. Pro. Code, which provides in S. 368 that, unless the plaintiff applies within the prescribed time to substitute the representatives of the deceased defendant, the suit shall abate. Not only there is then nothing in the Code to authorise the institution of a suit against a dead man as distinct from a suit against his legal representatives, but the death of the defendant puts an end to the suit, unless steps are taken, within a prescribed period, for bringing in the legal representative.

Consequently, when a plaint is presented by a plaintiff for the purpose of instituting a suit

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

against a defendant, in accordance with the provisions of the Code, and it afterwards turns out that the defendant had died before the presentation of the plaint, the Court has no jurisdiction to substitute the representatives of the deceased as defendants and allow the suit to proceed against them. **Yeerappa Chetty v. Ponnai**, 17 M.L.J. 551.

WALLIS and MILLER, JJ.

References :—12 W.R. 45, *F*; 16 M. 319, *Expl.*; 18 Q. B. D. 250, *R*.

(206-b) S. 368—See Nos. 147 and 204, *supra*.

(207) Ss. 368 and 582—*Death of one of the defendants in mortgage suit pending appeal—Effect of omission to bring his legal representative on record.*

Where one of the defendants in a mortgage suit has died pending the appeal, and no application has been made to bring on his representative as a party to the appeal, the appeal does not necessarily abate. The ruling in 31 I.A. 71 (P.C.) is intended to be confined to cases, in which the litigation cannot proceed to a final adjudication, without the representative of the deceased party. **Ranga Srinivasachari v. Gnanaprakasa Mudalliar**, 2 M.L.T. 36=30 M. 67.

SUBRAHMANIA AYYAR and MILLER, JJ.

(208) Ss. 368 and 582—*Substitution—Delay—Abatement—Suit by joint-owners to set aside revenue sale—Death of some of plaintiffs, respondents, during pendency of appeal—Necessary party.*

During the pendency of an appeal against a decree setting aside the sale of a joint estate for arrears of revenue, two of the plaintiffs, respondents, died and there was no application for substitution of the heirs of the deceased respondents, the right to sue not surviving against the other respondents.

Held, that the appeal should abate, inasmuch as the decree could not be reversed without the representatives of the deceased being placed on the record;

that, under no circumstances, could the decree be affirmed as to the unascertained shares of some joint share-holders and reversed as to the unascertained shares of the other joint share-holders. **Dharanjit Narayan Singh v. Chandeshwar Prosad Narayan Singh**, 11 C.W.N. 504=5 C.L.J. 393.

HARINGTON and GEIDT, JJ.

(209) Ss. 368, 582 and 587—*When application*

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

to be made in appeals from appellate decrees—Limitation Act (XV of 1877), Sch. II, Arts 175 C, and 178.

An application made to bring the representatives of a deceased respondent on the record, whether that appeal is an appeal from an original or an appellate decree, is an application made under S. 368 of the Code, the provisions of which have been extended in the one case by S. 582, and in the other by S. 587.

Art. 175 (c), Limitation Act, Sch. II, applies to an application for substitution of names, whether made in an appeal from an original or an appellate decree. **Madhuban Das v. Narain Das**, 4 A.L.J. 397=A.W.N. (1907) 155=29 A. 535.

KNOX and RICHARDS, JJ.

References :—28 M. 498, *F*; 29 M. 529, *not F*.

(210) S. 372—*Substitution, as plaintiff, of assignee in place of assignor—Limitation—“New plaintiff.”*

When a person, who has not been on the record, is substituted as a plaintiff, in the place of the original plaintiff, under S. 372 of the Civ. Pro. Code, the person so substituted must be taken to be brought on the record, subject to the law of limitation applicable to the case. There is nothing in that section to exclude the operation of S. 92 of the Limitation Act. **Sheikh Abdul Rahman v. Sheikh Amir Ali**, 11 C.W.N. 521 (F.B.)=5 C.L.J. 486=34 C. 612=2 M.L.T. 312.

MACLEAN, C.J., and HARINGTON, BRETT, MITRA and GEIDT, JJ.

References :—25 C. 409, *Appr.*; 5 C. 720, *disapproved and Distd.*

(210-a) S. 372—See Nos. 108 and 195, *supra*.

(211) S. 373—*Unconditional withdrawal of ‘appeal and claim’—Second suit—Not maintainable.*

A suit for redemption was dismissed by the Court of first instance for want of necessary parties. In the appellate Court the plaintiff put in an application saying that he did not wish to prosecute his “appeal or claim,” the other side having given up his costs. The plaintiff then brought a second suit to redeem. *Held*, that the effect of the application was that the plaintiff gave up all his claims to redeem the property, the consideration for the withdrawal being that the respondents gave up their costs, and the suit was barred by the last paragraph of S. 373 of the Code. **Ram Prosad**

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

v. Dugar Singh, 4 A.L.J. 201 = A.W.N. (1907), 91.

STANLEY, C.J., and BURKITT, J.

(212) S. 373—Abandonment of part of claim—Improper valuation of Court fee—See MORTGAGE (REDEMPTION), No. 15, 4 A.L.J. 375 = A.W.N. (1907), 138 = 29 A. 471.

(212-a) S. 373—See No. 153, *supra*, and No. 225, *infra*.

(213) S. 375—Compromise decree giving mortgage-decree for debt not secured by mortgage, validity of—Public policy—Minority of some of the defendants.

A person, who sues to recover money on a registered mortgage bond, and also money due on an account, may, in accordance with the terms of the compromise entered into under S. 375, obtain a mortgage-decree for the whole amount of his claims, including the (account) debt not secured by a mortgage. Such a compromise is neither illegal nor opposed to public policy. The fact that some of the defendants are minors makes no difference, if the Court approves of the compromise as being in their interest. **Subbarayadu v. Venkataratnam**, 17 M.L.J. 200.

BENSON and WALLIS, JJ.

(214) S. 375—Compromise, validity of—Suit, scope of.

A sued B for damages for crops misappropriated. A petition of compromise was put in, by which the amount of damages was settled, and B also agreed to hold the land under A at a specified rent ;

Held, that the agreement as to the tenancy was outside the scope of the suit, and although incorporated in the decree, did not operate as *res judicata* (a). **Purna Chandra Burman v. Panchkari Ghose**, 5 C.L.J. 15.

RAMPINI and HARRINGTON, JJ.

Reference :—(a) 22 M. 508 (P. C.), D.

(215) S. 375—Compromise need not be reduced to writing—Oral evidence of its terms under S. 91, Evidence Act—Specific Relief Act, S. 9.

S. 375 of the Code does not require that the agreement or compromise itself shall be reduced to the form of a document, but only that the terms of it shall be recorded in the suit, or in other words, that a note of the terms should be made in the proceedings. The agreement or compromise itself, that is made out of Court

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

may be in writing or by word of mouth. If the Court did not record the terms of it, S. 91, Evidence Act, is no bar to a suit being brought on the terms of the compromise. Moreover, S. 375 only allows the decree to be final, so far as relates to the subject-matter of the suit. So, when an agreement or compromise is made in a suit under S. 9, Specific Relief Act, the Court's decree under S. 375 does not bar any person from suing to establish his title to property and recover possession thereof. **Bi Ya v. On Gaing**, 3 L.B.R. 243.

HARTNOLL, J.

(216) S. 375—Agreement between parties to suit that plaintiff and his younger brother should execute a sale-deed of plaintiff property to defendant, within a week, and that the suit should be dismissed in default—Refusal of younger brother to join in its execution—Impossibility of performance—Contract Act, S. 56.

S. 375 of the Code does not preclude the parties to a suit from entering into an agreement, to the effect that the plaintiff and his younger brother should execute a joint sale-deed, within a week, conveying the property in dispute to the defendant, for a certain amount, and that, if the plaintiff should fail to do so, the suit should be dismissed. Nor does it preclude the Court from giving effect to it, if satisfied that the party has failed to perform his part.

The refusal, by the younger brother, to join in the execution of the agreement cannot make the performance of the agreement by the plaintiff impossible, within the meaning of S. 56, Contract Act. **Rangaswamy Kavundan v. Trisa Maistry**, 17 M.L.J. 37.

WHITE, C.J., and MILLER, J.

(217) S. 375—Consent decree in terms of the compromise—Forfeiture clause in the decree—Court can relieve against forfeiture.

When a plaintiff is seeking to enforce, by original suit, a right to forfeiture contained in a consent decree, in the terms of a compromise, whereby the status of landlord and tenant is established between the plaintiff and defendant, the Court, in the exercise of its equitable jurisdiction, is not precluded from granting such relief against forfeiture as it might have granted, had the status arisen from contract or custom. **Krishna Bai v. Hary Govind**

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

Kulkarni, S Bom. L.R. 818 (F.B.) = 1 M.L.T. 370 = 31 B. 15.

JENKINS, C.J. and ASTON, BEAMAN and HEATON, JJ.

References:—10 B. 435, 24 M. 265, 26 M. 31, R.

(218) S. 375—*Compromise decree containing reliefs not covered by suit, validity of.*

The mere fact that a compromise decree provided for reliefs, which the plaintiff could not have obtained in the suit, if it had been tried out, affords no ground for questioning the decree in execution (a), provided there is nothing unlawful in them, although the terms of the decree might have been objected to on appeal (b). **Anantha Narayana Aiyar v. Abdul Karim**, 17 M.L.J. 255 = 2 M.L.T. 849 = 30 M. 421.

BENSON and WALLIS, JJ.

References:—(a) 9 A. 229, 16 M.L.J. 354, 5 C.W.N. 485, R. (b) 18 M. 410, 22 M. 214, R.

(219) S. 375—*Suit for simple money-decree—Compromise charging the amount on property of defendant—Compromise may be embodied in decree.*

There is nothing in principle or in the language of S. 375 of the Civ. Pro. Code to restrict the relief to be granted in accordance with a compromise, to what is prayed for in the plaint.

So, in a suit where the plaintiff prayed for a simple money-decree and a compromise was entered into between the parties, whereby the defendant's property was charged as security for the debt, it was held that as such an agreement was "lawful" and "related to the suit" it could be embodied in the decree. **Joti Kuruvetappa v. Izari Sirusappa**, 30 M. 478.

SURRAHMANIA AYYAR and BENSON, JJ.

References:—(a) 18 M. 414; 22 M. 214, D.

(219-a) Ss. 380 and 410—*Pauper plaintiff, if can be required to furnish security for defendant's costs.*

The provisions of S. 380 of the Civ. Pro. Code cannot apply to the case of a person to whom permission had been granted under S. 410 of the Code to sue as a pauper, as the effect of an order requiring such a person to furnish security for the defendant's costs would be to render nugatory the order under S. 410.

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

In making an order under S. 380 of the Civ. Pro. Code, against a plaintiff who had been permitted to sue as a pauper, the Court acted in the exercise of its jurisdiction illegally and with material irregularity (a). **Mussamat Hafizan v. Abdul Karim**, 12 C.W.N. 168.

BRETT and HOLMWOOD, JJ.

Reference:—(a) 17 W.R. 68, *relied on*.

(220) S. 396—*Partition—Commission to make partition—Issue of commission to one person only.*

A Court issuing, under section 396 of the Code, a commission to make partition of immoveable property not paying revenue to Government, cannot legally issue such commission to one commissioner only.

Per RICHARDS, J.—But there is nothing to prevent the parties to partition proceedings, agreeing that one commissioner only should be appointed; nor does it follow that all the partitions that have been made are invalid by reason of the fact that only one commissioner has been appointed. **Mulchand v. Muhammad Ali Khan**, A.W.N. (1907), 32 = 2 M.L.T. 63 = 4 A.L.J. 76 = 29 A. 235.

(223-a) S. 396—*Decree in a partition suit—Application for division by metes and bounds, whether one for execution of the decree—Limitation Act, Sch. II. Arts. 178, and 179, applicability of—Right of judgment-debtor to plead bar by limitation of a previous application ordered without objection—Res-judicata.*

The decree of the Munsiff, in a suit for partition by metes and bounds, was defective as a final decree for partition, since the Munsiff, who could have indicated, in the decree, the exact portion of the share, which was to be given up to the plaintiff, omitted to do the same and the decree did not specify such share by metes and bounds. Held, until the exact position of the plaintiff's share was indicated and a final decree passed, accordingly, as contemplated by S. 396, of the Code, there was no decree, which the Court could execute; and applications towards effecting a partition before such final indication would constitute proceedings in the suit itself and not in execution of the decree as pointed out in **Dwarka Nath Misser v. Barinda Nath Misser** (a). The applications above-mentioned were not applications to which the

Civ. Pro. Code (Act XIV of 1832).—(Contd.).

Limitation Act would be a bar since the defect in the decree to cure which they were made was one which the Court itself was bound to cure without any formal application by the parties (b). *Held*, also, where an order for execution has been made by a competent Court on a previous application for execution, after due service of notice on, and without any objection by, the judgment-debtors, it could not afterwards be pleaded on a subsequent application that the previous application was barred (c). **Durga Das v. Faqir Chand**, 47 P.R. 1906 = 86 P.L.R. 1907.

ROBERTSON and CHITTY, JJ.

References—a) : 22 C. 425, F. (b) 28 M. 127, F. (c) 8 C. 151, 6 B. 54, 24 A. 282 and 24 M. 669 R.

(220-b) S. 396—See No. 140, *supra*.

(221) S. 398—*Account, Commissioner to examine—Commissioner's duty—Commissioner, when to take evidence under S. 398, Civ. Pro. Code—Commissioner, not a Judge or an Arbitrator—Decision of Commissioner, value of.*

On an application by the parties, the appellate Court ordered a certain vakil to be appointed Commissioner with powers under S. 398, Civ. Pro. Code, to examine the accounts and objections to the same, and it was further ordered that the vakil should submit to the Court his report on the said accounts and objections :

Held, that the object of the order was to refer to the Commissioner the examination of the accounts for the purpose of enabling the Court to see what the accounts were, and the duty of the Commissioner was to make out an account, showing to the Court exactly what the account in the books stood and nothing else.

The business of the Commissioner was practically to place himself in the position of an assistant to the Court, so as to give the Court all the information which the accounts gave and thus to enable the Court to come to a decision.

Held, further, that, under S. 398 of the Code, the Commissioner is entitled to take evidence in the matter referred to, so as to be able to report to the Court for the purpose of enabling it to give a judgment on the points at issue.

The Commissioner cannot deal with the case as if he is the Judge or an arbitrator appointed by the parties.

Civ. Pro. Code (Act XIV of 1832).—(Contd.).

If the Commissioner's report does not show what the accounts are, but merely contains a decision in favour of one party, the report is waste paper and is of no assistance to the Court whatever. **Tincowri Debi v. Suttia Doyal Banerji**, 6 C.L.J. 105.

PETHERAM, C.J., and GORDON, J.

(222) Ss. 401, 407 (d) and 592—*Leave to appeal in forma pauperis—Reference to Subordinate Court—Final disposal of the application—Appellate Court's duty.*

On an application for leave to appeal in *forma pauperis*, the High Court directed the Subordinate Judge to inquire into the pauperism or otherwise of the appellant and report. The Subordinate Judge made the inquiry and reported that the petitioner was a pauper, and also that she had rendered herself incapable of appealing as a pauper by entering into an agreement, with some persons falling within the terms of S. 407 (d). *Held* that the order of the Court calling upon the Subordinate Judge to report did not operate as a final disposal of the application, and that it was open to the High Court upon the receipt of the report to consider whether the case was one in which leave to appeal in *forma pauperis* ought to be granted. But the High Court dismissed the application on the ground that the petitioner had entered into an agreement falling within S. 407 (d).

In deciding whether leave is to be given to a person to appeal in *forma pauperis*, it is the duty of the Court to have regard to the rules contained in Chap. XXVI, the right of appeal, according to the construction of S. 592 of the Code, being subject to the rules contained in that chapter (a). **Hamfa Bai v. Meanjee Salt**, 17 M.L.J. 447.

WHITE, C.J., and MILLER, J.

Reference :—(a) 26 M. 369, R.

(223) Ss. 406, 462, 506 and 562—*Decree in accordance with award—Validity of reference to arbitration by guardian ad litem of minor without Court's sanction.*

Where a decree purports to have been passed in accordance with the terms of an award filed by arbitrators, and objections thereto were not raised in the lower Court, nor filed against the award, within the period of ten days prescribed under Art. 158, Limitation Act, it cannot, for the first time, be contended in revision that,

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

some of the defendants being minors, reference could not be made by their guardians *ad litem*, without obtaining express sanction of the Court, under S. 462, Civ. Pro. Code, and that there was no written application for reference by these guardians *ad litem*. It is not necessary that such application should be in writing (a).

The word "agreement" in S. 562 of the Code seems to refer to an agreement by way of settlement, rather than of the nature of an application under S. 406. **Uda v. Mul Chand**, 4 P.R. 1907 = 20 P.W.R. 1907.

RATTIGAN and LAL CHAND, JJ.

References:—24 M. 326, 28 A. 35, 37 P.R. 1895, 18 P.R. 1891 (F.B.), R. (a) 27 C. 61, R.

(223-a) S. 407 (d)—See No. 222, *supra*.

(224) Ss. 407 and 409—See *FORMA PAUPERIS*, No. 1, 3 L.B.R. 248.

(224-a) S. 409—See No. 224, *supra*.

(224-b) S. 410—See No. 219-a, *supra*.

(225) Ss. 411, 412 and 373—*Pauper suit—Compromise of the suit—Withdrawal of the suit—Failure in the suit.*

Where a pauper plaintiff withdraws from a suit, without permission under S. 373 of the Code, as the result of a compromise, by which he obtains a substantial part of the relief claimed, he fails in the suit, within the meaning of S. 412 of the Code. **The Secretary of State for India v. Bhagirathibai**, 8 Bom. L.R. 689 (F.B.) = 31 B. 10.

JENKINS, C. J., and ASTON, BEAMAN and HEATON, JJ.

References:—15 B. 77 and 18 B. 464, *overruled* (225-a) S. 412—See No. 225, *supra*.

(226) S. 424—*Suit against public officer—Notice—Suit to recover articles seized by Police during a search.*

The plaintiff sued to recover from the defendant three account books, which he alleged that the defendant, a Sub-Inspector of Police, had seized during a search, apparently in pursuance of the provisions of S. 165 of the Code of Criminal Procedure, of the plaintiff's house. Held that the defendant, if he seized the books, which was denied, did so in his capacity as a Police officer, and that the suit was not maintainable in the absence of the notice prescribed by S. 424 of the Code of

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

Civil Procedure. **Bakhtawar Mal v. Abdul Latif**, A.W.N. (1907), 170 = 29 A. 567.

BANERJI, J.

References:—26 A. 220, D; 24 C. 584, R.

(227) S. 424—*Notice to public officer—Objection as to want of notice under S. 424 to be taken only by Secretary of State—See PRE-EMPTION, No. 3, 10 O.C. 49.*

(228) S. 424—See Act IX of 1880 (ROAD CEFS, BENGAL), No. 3, 5 C.L.J. 148 = 34 C. 257.

(229) S. 433—*Suit against a ruling Chief—Permission to sue granted in absence of necessary conditions precedent—Jurisdiction.*

A suit for the recovery of arrears of salary was brought in the Court of the Subordinate Judge of Agra against the Maharajah of Jaipur. The plaintiff obtained the consent of the Governor-General in Council to the institution of the suit, granted ostensibly in accordance with the provisions of S. 433; but, in fact, none of the conditions enumerated in clause (2) of the section existed. Held that the suit was not maintainable. **Maharaja of Jaipur v. Lalji Sahai**, A.W.N. (1907), 95 = 4 A.L.J. 358 = 29 A. 379.

STANLEY, C.J., and BURKITT, J.

(229-a) S. 437—*Suit against mutwallis—Suit for rent—Parties—Minor—Representation.*

When a suit for rent was brought against two persons, in the capacity of mutwallis, but one of them who was a minor was not properly served, and no guardian was appointed on his behalf,

Held, that mutwallis are trustees, and that the presence of all of them in the suit was essential, and that it was properly dismissed for defect of parties. **Syed Abdul Rab Chowdhury, v. H.C. Eggar**, 12 C.W.N. 160.

MACLEAN, C.J., and GEIDT, J.

(230) S. 440—*Guardian and Wards Act (VIII of 1890), S. 53—Hindu father has no statutory authority to appoint testamentary guardian—"Authority competent in this belief."*

S. 47 of the Indian Succession Act being not applicable to Hindu wills, a Hindu father has no statutory power to appoint a guardian to his son after his death.

The words "authority competent in this behalf," in Code of Civil Procedure, S. 440, do not include the case of a Hindu father purporting to appoint a guardian under general Hindu Law.

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

S. 440 of the Code of Civil Procedure does not apply to all guardians, as, e.g., it cannot apply to natural guardians.

Quære.—Whether a Hindu father has power to appoint a guardian to his minor son under the Hindu Law? **Budhlal Monji v. Morarji Premji**, 9 Bom. L.R. 553=81 B. 413.

JENKINS, C.J., and BEAMAN, J.

(231) S. 443—Violation of the provisions of—irregularity—Decree against guardian *ad litem*, other than certificated guardian.

The violation of the provisions of S. 443 of the Civ. Pro. Code by a Court is merely an irregularity, and, as such, does not of itself vitiate either a decree passed in a suit or a sale consequent upon such a decree.

Where, therefore, the mother of certain minor defendants was appointed their guardian *ad litem* when there was a certificated guardian, and a decree was passed against the minors and their property was sold in execution of the decree, *held*, that the decree and the sale were not void. **Dammar Singh v. Pirbhu Singh**, 4 A.L.J. 155=A.W.N. (1907), 70=29 A. 290.

STANLEY, C.J., and BURKITT, J.

(232) Ss. 456 and 457—Minor, suit brought by, to set aside a decree passed against him—Guardian *ad litem*, appointment of, Conditions necessary for—proper representation of minor in a suit to be done with great care—Affidavit that the guardian has no interest adverse to the minors—Certificated guardian, mortgage executed by, without the sanction of the Court, not void *ab initio*—Negligence on the part of a guardian *ad litem* in conducting the suit necessary to be shown before the decree can be set aside.

Held, that a mortgage executed by a certificated guardian without the sanction of the Court is not void *ab initio*, but that the absence of such sanction relegates the guardian to the position which he would have occupied if he had not been granted a certificate at all.

Held, also, that, where a minor challenges the validity of a decree passed in a suit brought against him, he must establish, either that he was not properly represented in the suit in which the decree was passed against him, or that the guardian *ad litem* appointed by the Court was guilty of gross negligence in the conduct of that suit.

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

Held, further, that, where a person is appointed by a Court as the guardian *ad litem* of a minor, it is the duty of the Court to see that the provisions of the Code relating to the appointment of the guardian are duly complied with. There must, in such cases, be an affidavit verifying the fact that the proposed guardian has no interest adverse to the minor and is a fit person to be appointed. Where, therefore, there has been no such enquiry at all as to the fitness of the guardian, his appointment is not good in law, and the minor cannot be said to be properly represented in the case, and the decree, if any, passed against the minor in such a suit is not binding on him. **Ghulam Abbas v. Munnal Lal**, 10 O.C. 321.

SANDERS and GREEVEN, JJ.

References:—9 A. 340, 25 A. 59, 9 O.C. 97, 12 B. 18, A.W.N. (1894), 141, 16 I.A. 195, 28 A. 137, 23 A. 459, 18 A. 373, 23 B. 287, 11 B. 130, 24 A. 383, 22 C. 8, 18 A. 373, 30 C. 1021, 5 O.C. 197, 33 I.A. 128, 11.

(232-a) S. 457—Guardian *ad litem*—Co-defendant—Married woman.

The mother of several minor defendants, who was herself a defendant as also was her husband, was appointed guardian *ad litem* for her minor sons:

Held, this was illegal being contrary to the provisions of S. 457, Civ. Pro. Code, and the suit must be decided afresh after the appointment of a new guardian. **Kall Shankar Sahai v. Maharaja Pratab Udai Nath Sahi Deo**, 6 C.L.J. 36.

RAMPINI and SHARFUDDIN, JJ.

(233) S. 459—Guardian *ad litem*—Married woman—Husband alive but non compos mentis.

In no case can a married woman be appointed as guardian *ad litem* inasmuch as she is so disqualified and any apparent appointment of her as guardian is not a mere irregularity. A woman whose husband is alive but non compos mentis, cannot be appointed guardian *ad litem* of her minor son. **Kundan Lal v. Gajadhar Lal**, 4 A.L.J. 698=A.W.N. (1907), 243.

KNOX, A.C.J., and DILLON J.

Reference:—23 A. 459, F.

(233-a) S. 457—See No. 232, *supra*.

(234) S. 462—Compromise on behalf of infant—Sanction of Court—Compromise if can be set aside.

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

When a suit in which a minor plaintiff (represented by his next friend) was a party, was compromised after it had been opened on his behalf, and the witness examined, and it appeared that the infant had no separate interest from the adult members of the family, who took part in the compromise and assented to it, and the Court, having had its attention drawn to it, approved of it, and it was stated solemnly in an order made by the Court to be for the benefit of the infant.

Held, that the compromise cannot be set aside. **Ramaswer Pershad Singh v. Ram Bahadur Singh**, 11. C.W.N 178 (P.C.) = 34 C. 70 = 5 C.L.J. 175 = 17 M.L.J. 59 = 2 M.L.T. 165.

LORD MACNAUGHTEN, LORD ATKINSON,
SIR ANDREW SCOBLE and SIR ARTHUR
WILSON.

(234-a) S. 462—See No. 223, *supra*.

(235) Ss. 483, 505 and 196—*Attachment before judgment—Partnership property—Appointment of Receiver—Affidavits—Contents—Practice.*

S. 483 of the Civ. Pro. Code provides for the attachment of the property of the judgment-debtor: it does not apply to the joint property of a partnership, of which the judgment-debtor is a member. In cases of this kind, the proper order to make is the appointment of a Receiver, under S. 503 of the Code.

Affidavits produced in a case should comply with the terms of S. 196 of the Code. In cases of interlocutory applications, the statements of the declarant's belief are admissible; but the belief must be stated and reasonable grounds thereof set forth. **Damodar Nandram v. Panalal Madiram**, 9 Bom. L.R. 540.

JENKINS, C.J., and BRAMAN, J.

(236) Ss. 483 and 617—*Attachment before judgment of property outside jurisdiction, validity of—Grounds of reference to Chief Court under S. 617.*

Property outside the local limits of the jurisdiction of a Court cannot be attached before judgment under Ch. XXXIV of the Code (a).

A Subordinate Court in Lower Burma is bound to follow the rulings of the Chief Court, Lower Burma, notwithstanding that another High Court had ruled differently on the point, and the fact that there is such a conflict between the Chief Court's ruling and another High Court's ruling is no ground for referring the question to the Chief Court under S. 617

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

C.P.C. Siva Sawmy Sitta v. Sullman Dawoodji Parek, 8 L.B.R. 255.

Fox, C.J., and IRWIN, J.

References:—(a) 1 L.B.R. 310, 8 M. 20, 5 Bom. L. R. 570, F; 7 C.W.N. 216, not F.

(237) Ss. 483, and 648—*Property outside the jurisdiction of Court—Applicability of S. 483.*

S. 648 of the Code does not extend the operation of S. 483 to property situated outside the jurisdiction of the Court. **Kin Kin v. Nga Kyaw We**, U.B.R. (1907), Civil Procedure, 13.

SHAW, J.C.

References:—1 L.B.R. 310, P.J.L.B. 56, 8 M. 20, 7 C.W.N. 216, R.

(237-a) S. 490—See No. 154, *supra*.

(238) Ss. 491 and 622—*Order under S. 491 to be embodied in the decree—Revisional jurisdiction.*

Having regard to the express language of S. 491 of the Code, an order for compensation, for attachment before judgment on insufficient grounds, must be embodied in the decree in the suit, and is not capable of being passed, after the decree in the suit has been given.

If such an order is passed after the decree, without any fault on the part of the defendant, the proper course for a Court of revision to adopt will be, in order that justice may be secured to the defendant, to set aside the decree as well as the order for compensation, and remit the case back to the lower Court, in order that it may embody its order as to compensation in the decree in the case. But where a suit is for more than Rs. 500, the High Court, in exercise of its powers of revision under S. 622 of the Code, cannot interfere with the decree, as a second appeal lies against the decree. **Kepilo Patro v. Kasinadha Patro**, 17 M.L.J. 310.

SUBRAHMANYA AIYAR, J.

(238-a) S. 492—See No. 33, *supra*.

(239) Ss. 492 and 493—See **INJUNCTION**, No. 2, 34 C. 97.

(240) Ss. 492 and 493—The powers of the High Court to grant temporary injunction not confined to the terms of Ss. 492 and 493 of the Civ. Pro. Code—See **INJUNCTION**, No. 1, 34 C. 101.

(240-a) S. 493—See Nos. 33, 239 and 240, *supra*.

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

(240-b) S. 498—See No. 159, *supra*.

(241) S. 503—Receiver, appointment of, application for—Conditions necessary for the appointment of a receiver—"Preservation, realisation, better custody, or management of the property," meaning of—Decree-holder, application by, for appointment of a receiver of the property under attachment in execution of his own decree—Sale of heavily encumbered property.

Held, that the power of a Court to appoint a receiver of the property, attached by the decree-holder, depends upon S. 503 of the Code. It must therefore be made to appear to the Court that the appointment of a receiver is necessary for the realization, preservation or better custody or management of the property. Where, therefore, a decree-holder had attached certain property in execution of his decree and the Court refused to pass an order for sale of the property, on the ground that it was heavily encumbered, the decree-holder could not apply for the appointment of a receiver under S. 503. **Raja Muneshar Bakhsh Singh v. Babu Jagan Nath Prasad**, 10 O.C. 268.

CHAMBER, J., and GREEVAN, A.J.C.

Reference :—26 C. 772 (777 and 778), R.

(241-a) S. 503—See No. 155, *supra*.

(242) Ss. 503 and 505—Receiver, appointment of—Receiver, if may sue in his own name—District Judge, sanction of, to the appointment—Sanction subsequently obtained, if validates proceedings commenced.

The order of appointment of a receiver can be made by a Subordinate Judge only after he has been authorised to do so by the District Judge. The question whether the appointment is invalidated, if it is made by the Subordinate Judge without the previous sanction of the District Judge, but is subsequently approved by him, is a question rather of power than of jurisdiction of the Court.

It is not essential, in all cases, where a power may be exercised with the assent of a third person, that such assent must be given before the execution; there may be a ratification by subsequent consent (a).

There may be cases in which the nature and object of the power and the surrounding circumstances point to a previous consent as essential, in which event the consent must be obtained before the execution and subsequent consent is insufficient (b).

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

Where the order for the appointment of a receiver was made by a Subordinate Judge and the nomination was subsequently approved by the District Judge, the requirements of the law were substantially complied with, and whatever defect there was in the form of the proceeding, it was remedied by the subsequent order of the Subordinate Judge, although it was made after the institution of the suit in which the question of the validity of the appointment was raised (c).

S. 503 of the Code authorises the Court to grant to the receiver all such powers as to bringing and defending suits as the owner himself has. When an appointment has been made under that section, and full powers are granted to the receiver, powers are conferred upon the receiver to bring and maintain suits in his own name, always supposing that the ownership of the property is completely represented in the suit in which the receiver is appointed (d).

It is competent to a Court to authorise a receiver to sue in his own name, and a receiver who is authorised to sue, though not expressly in his own name, may do so by virtue of his appointment with full powers under S. 503, of the Code (e). **Jagat Tarinil Das v. Nabagopal Chaki**, 5 C.L.J. 270 = 34 C. 305.

MOOKERJEE and HOLMWOOD, JJ.

References :—(a) (1859) 1 De G.F. and J. 253, (1890) 45 Ch. D. 139, 9 I. A. 8 = 8 C. 422 and 23 C. 87, R. (b) (1834) 10 Bing. 363, 38 R. R. 458, 3 Madd. 98, 18 R.R. 200; 25 A. 187, 26 A. 162, R. (c) 30 C. 699, *Dist.*, 2 C.L.J. 70, and 4 C. L. J. 421, R. (d) 25 C. 642, R. (e) 10 C. 713 (733), R., 10 W. R. 430, 12 W.R. 117, 6 B.L.R. 486 and 2a Q.B.D. 179, *Dist.*, 8 M. 222, 8 M. 418, 9 M. 334, 14 C. 323, 18 C. 477 and 26 C. 715, R.

(242-a) S. 505—See Nos. 235 and 242, *supra*.

(243) S. 506—Reference by pleader not expressly authorised—Knowledge of party of the reference—Acquiescence, effect of.

A pleader should not apply for an order for referring a case to arbitration, unless he is expressly authorised to do so. A *vakalatnama* in general terms is wholly insufficient.

But, where the party, on whose behalf the application is signed, knows about it and acquiesces in it, he cannot raise the objection of want of authority in the pleader afterwards. **Ram Jiawan Ram v. Kail Charan Singh**, 4 A.L.J. 842 = A.W.N. (1907), 139 = 29 A. 429.

RICHARDS, J.

Civ. Pro. Code (Act XIV of 1883).—(Contd.).

(244) S. 506—*Validity of the award when one of the parties not joining submission.*

In a suit to enforce a mortgage, a joint written statement was filed on behalf of the mortgagor, his sons, and grandsons. The suit was referred to arbitration, but the submission was not signed by one of the defendants. Their pleader, however, signed it on behalf of all the defendants. An award was made. Objections preferred to it by the defendant who had not signed it, were overruled, and a decree was passed in accordance with the award against all the defendants.

Held, there was no reference to arbitration on behalf of the defendant who had not signed the submission, and there being no award in law, it could not bind any of the defendants (*a*). **Ka-dhu Singh v. Daryao Singh**, 4 A.L.J. 347 = A. W.N. (1907), 147 = 29 A. 423.

KNOX and RICHARDS, JJ.

Reference :—(*a*) 24 A. 229, D.

(245) S. 506—*Reference to arbitration, not concurred in by all the parties—Validity—Award, ground for setting aside.*

When a reference to arbitration is made in the course of a suit, and an award made upon it, the award cannot be set aside on the ground that all the parties to the suit did not concur in the reference. **Lal Mohan Pal v. Surya Kumar Das**, 11 C.W.N. 1152.

RAMPINI, C. J., and SHARFUDDIN, J.

Reference :—33 C. 899, F.

(246) S. 506—*Reference to arbitration—Order of reference not on application of all parties.*

S. 506 of the Code gives power to make an order of reference to arbitration, if all parties to the suit desire that the matter should be so referred. So, where a defendant, who had appeared and filed a written statement, did not join in the application for the order of reference, an award made on a reference by Court is illegal (*a*).

Quære :—Whether it is necessary for parties, who had not appeared, and who apparently had no interest in the suit, to join in applying for an order of reference. **Rangaswami Aiyar v. Swami Aiyar**, 17 M.L.J. 394.

BYNEN and WALLIS, JJ.

References :—(*a*) 26 M. 47, 9 C.W.N. 873, F. A. 229, R.

Civ. Pro. Code (Act XIV of 1883).—(Contd.).

(246-a) S. 506—See No. 223, *supra*.

(247) Ss. 506 and 510—*Arbitration.*

Held that when parties apply orally to the Judge to refer the suit to arbitration, and the Judge reduces their application to writing, and then makes a reference to arbitration, it is not open to him, having regard to the provisions of S. 510 of the Civ. Pro. Code, to supersede that reference, the arbitrator not having declined to act.

Held further, that the second paragraph of S. 506 is directory only. **Abdul Hamid v. Riyaz-ud-Din**, 4 A.L.J. 691 = A.W.N. (1907) 273.

AIKMAN, J.

References :—6 M.I.A. 184, D; 27 C. 61 and 23 B. 699, R.

(248) Ss. 506 and 521—*Arbitration—Award made within the period fixed not filed before the expiry of period—Validity.*

An award written and signed before the date fixed by the Court under S. 508 of the Code for delivery, but not filed in the Court before the expiry of that period, is valid within the meaning of S. 521 of the Code.

The expression "delivery" in S. 508 of the Code means "making" and does not mean "filing in Court." **Shagat Ram v. Ganda Singh**, 89 P.R. 1907.

REID, J.

References :—13 B. 119, 22 M. 22 and 26 A. 105, F. 8 A. 548 and 13 A. 300 (P.C.), D.

(248-a) S. 510—See No. 247, *supra*.

(249) Ss. 520, 521, 522, 525, 526—*Arbitration out of Court—Objection to validity of submission—Appeal.*

If an objection to the validity of the submission is made and the Court disallows it, no distinction can be drawn between such a case and one where an objection is taken, which is specifically mentioned in S. 520 or 521. The intention of the Code seems to be that, in the one case as much as in the other, no appeal shall lie, except on the grounds mentioned in S. 522. The principle of finality appears to be equally applicable. **Nga Hmaung v. Nga Kyaw Ya**, U.B.R. (1906), Civil Procedure, 52.

SHAW, J.C.

References :—10 C.W.N. 609, F; U.B.R. (1904-1905), Civil Procedure, 40, 20 I.A. 51 (P.C.); 10 C.W.N. 601, R.

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

(250) *Ss. 520, 521 and 525—Arbitration—Application to file a private award—Rejection of such application—Memorandum of appeal—Proper Court fee—Court Fees Act, Art. 17, cl. (6)—Defective private award—Award effecting partition of immoveable property used for purposes of S. 525 of C.P.C.—Registration Act, S. 17 (b).*

Cl. 6 of Art. 17 of the second schedule of the Court Fees Act applies to a memorandum of appeal from an order rejecting an application to file an award under S. 525 of the Code. The memorandum of appeal is sufficiently stamped, if it bears a Court Fee of Rs. 10 and not an *ad valorem* fee (a).

In proceedings which have been initiated by an application under S. 525 of the Code, the Court has no power to amend the award or to remit it for re-consideration, but must either affirm it in its entirety or wholly reject it (b).

Where the arbitrators appointed under an agreement between the parties made an award which was defective, and in which the arbitrators exceeded the power given to them under the agreement, *held* that the Court had no power to file the award.

Semble.—An award of arbitrators privately appointed does not require registration, even if it effects a partition of joint immoveable property and is signed by the parties to signify the acceptance of the award, in case the award is merely sought to be filed and to be made a rule of Court under S. 525 of the Code. **Bhagat Ram v. Paras Ram**, 84 P.R. 1907.

ROBERTSON and SHAH DIN, JJ.

References :—(a) 33 C. 11 and 70 P. R. 1881, D. 109 P.L.R. 1902, *Diss.* A.W.N. (1903), 214, F. (b) 27 A. 526, 18 P.R. 1892, R.

(251) *S. 521—Arbitrator receiving evidence from one party in the absence of the other—Judicial misconduct—Setting aside award—Appeal—Appellate Court's power to go behind first Court's order setting aside award.*

A Court is perfectly justified in setting aside the award of the arbitrators, on the ground that the latter had been guilty of judicial misconduct in having taken the evidence of one party in the absence of the other which was wholly unavoidable, and in having omitted to give the latter sufficient opportunity to produce his own evidence.

Quære.—Whether an Appellate Court had power to go behind the order of the first Court.

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

setting aside such an award. **Sohha Ram v. Ram Das**, 66 P. R. 1907.

ROBERTSON and SHAH DIN, JJ.

References :—2 A. 181, 3 A. 686, 28 A. 408 22 M. 202, 8 C.W.N. 390, R.

(251-a) S. 521—See Nos. 248, 249 and 250, *supra*.

(252) *Ss. 521 and 522—Arbitration—Award—Decree on judgment in accordance with award—Appeal.*

During the pendency of a suit in the Court of a Subordinate Judge, the matters in dispute between the parties were referred to arbitration. In due course, a document purporting to be the arbitrator's award was received by the Court through the post. Objections were filed by one of the defendants to the suit : but these objections were, after hearing, disallowed by the Court, which proceeded to pass a decree in accordance with the award.

Held, that an appeal would lie from such a decree, upon the ground that the so-called award was never delivered by the arbitrator and was, in fact and in law, no award at all. **Sham Lal v. Misri Kunwar**, A.W.N. (1907), 115 = 29 A. 426.

STANLEY, C.J., and BURKITT, J.

(253) *Ss. 521 and 522—Arbitration—Award—Decree on judgment in accordance with award—Appeal.*

The matters in dispute between the parties to a suit pending in the Court of a Munsiff were referred to arbitration. An award was delivered by the arbitrator, to which objections were filed, to the effect that the arbitrator had been guilty of misconduct. These objections were, however, overruled and decree was passed, which was in accordance with and not in excess of the terms of the award.

Held, that no appeal from such a decree would lie, the sole ground being that the arbitrator had been guilty of misconduct. **Bihari Lal v. Chunni Lal**, A.W.N. (1907), 117 = 4 A. L.J. 455 = 29 A. 475.

STANLEY, C.J. and KNOX and RICHARDS, JJ.

References :—29 C. 167 (P.C.), F; A.W.N (1907), 115, D.

(254) *S. 522—Award—Set aside by Court of first instance—Jurisdiction of appellate Court, to pass a decree in its terms.*

When a Court of first instance, through which a suit has been referred to arbitration,

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

sets aside the award on the ground of misconduct of the arbitrator, the appellate Court has no jurisdiction to pass a decree in the terms of the award. **Kalyan Das v. Pyare Lal**, 4 A.L.J. 256=A.W.N. (1907), 110.

AIKMAN, J.

Reference:—3 A.L.J. 168, *F*.

(255) *S. 522—Appeal—Time for setting aside an award not expired—Decree passed—Whether final.*

When a decree was passed in accordance with an award, before time for taking objections to the validity of the award had expired, *held*, that an appeal lay against the decree. Before passing such a decree, it is necessary for a Court to stay its hands, until the time for making an application to set aside the award had expired (*a*). **Najum-ud-din Ahmad v. Albert Puech**, 4 A.L.J. 450=A.W.N. (1907), 184=29 A. 584.

STANLEY, C.J., and BURKITT, J.

References:—(*a*) 19 A. 422; 23 W.R. 429, *R*.

(255-*a*) *S. 522*—See Nos. 75, 249, 252, and 253, *supra*.

(255-*b*) *S. 523*—See No. 6, *supra*.

(256) *Ss. 523 and 526—Award under, declared void—Maintainability of suit to enforce such award.*

Where an award was secured in proceedings taken under S. 523 and was declared to be void by the Court conducting such proceedings, a regular suit to enforce such award would not be maintainable.

Obiter.—It is doubtful whether a regular suit would lie to enforce an award, even in cases where such award has been held to be void on objections taken under S. 526 of the Code. **Miran Bakhsh v. Chiragh Din**, 19 P.R. 1907.=46 P.L.R. 1907.

LAL CHAND, J.

References:—113 P.R. 1890, 15 M. 99, 15 M. 474, 20 M. 491, *D*.

(257) *Ss. 523 and 526, difference between, as regards appeal—Revision*—See *APPEAL*, No. 4, 58 P.W.R. 1907 (*F.B.*).

(258) *S. 525—Arbitration—Award—Application to have the award filed—Record of rights extract to be annexed to the application—Bombay Land Record-of-Rights Act (IV of 1903), S. 10.*

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

It is not necessary to annex a record-of-right extract, required by S. 10 of the Bombay Land Record-of-rights Act, 1903, to an application in the case of proceedings under S. 525 of the Code. **Haridas Dayal v. Subraya Nagappah**, 9 Bom. L.R. 895.

RUSSELL, AG. C.J., and BATTY, J.

(258-*a*) *S. 525*—See Nos. 249 and 250, *supra*.

(259) *Ss. 525 and 526—Private award—Decree made on—Appeal—Questions that can be brought before an appellate Court in proceedings under Ss. 525 and 526.*

A private award having been filed by one of the parties under S. 525 of the Code, the other party objected, and his objections were overruled.

Held, that no appeal lay from a decree made in accordance with the award.

GEIDT, J.—The only questions, that can be brought before an appellate Court, in proceedings under Ss. 525 and 526 of the Code, are:—

(1) Whether any matter has been referred to arbitration, without the intervention of the Court, and an award made thereon.

(2) Whether the decree ultimately made is in excess of, or not in accordance with the award (*a*). **Abdul Ali v. Anwar Ali**, 11 C.W.N. 220.

HARINGTON and GEIDT, JJ.

References:—(*a*) 6 C.W.N. 226 and 10 C.W. N. 609, *considered*.

(260) *S. 526—Private award—Order refusing to file such award—Appealability.*

An order under S. 526 of the Code, refusing to file an award of arbitrators made out of Court, is appealable as a decree (*a*). **Mul Raj v. Ladha Mal**, 100 P.R. 1907.

ROBERTSON and KENSINGTON, JJ.

References:—(*a*) 26 A. 205, *Diss.* 27 M. 255; 29 M. 303; 25 C. 757; 33 C. 757; 84 P.R. 1907 (*F.B.*), *F.* 25 P.R. 1907 (*P.C.*) at p. 99; P.R. 1907, *F.R. R.*

(260-*a*) *S. 526*—See Nos. 249, 256, 257 and 259, *supra*.

(261) *S. 539—Applicability of,—Suit brought by the whole body of persons authorised to administer the trust.*

Held, that S. 539 does not apply to a case, where the suit is instituted by the whole body of persons, who are legally authorized to

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

administer the trust, to which it relates. **Ram Das v. Badri Narain**, A.W.N. (1906), 260 = 3 A.L.J. 773 = 29 A. 27.

KNOX and AIKMAN, JJ.

Reference :—10 C.W.N. 581, F.

(262) *S. 539—Suits relating to public charities—Suit must conform to sanction given.*

S. 539 of the Code lays down strict rules with a view to protecting trustees of public charities from vexatious and irresponsible suits; and the plaintiff in such a suit must conform to the terms of the sanction given.

Where the Collector sanctioned a suit to remove a trustee and to appoint a new trustee, a suit under that sanction, asking that the public be given power to make the appointment, could not be entertained, as the Collector contemplated appointment only by the Court (a).

The powers mentioned in the last paragraph of the section include also the powers of the Collector to authorise suits by private persons, and not merely power to sue (b). **Ganga Ram v. Ralla Singh**, 110 P.R. 1907.

CHATTERJI and JOHNSTONE, JJ.

References :—(a) 21 B. 257, L. (b) 24 C. 418, R.

(263) *S. 539—Breach of trust—Suit brought with the consent of the Advocate-General—Amendment of plaint by mentioning particulars of the breach of trust—No consent necessary.*

A suit instituted under the provisions of S. 539 of the Code complained generally about a breach of trust. The suit was brought with the consent of the Advocate-General. The plaint was subsequently amended by mentioning the particulars constituting the breach of trust: no consent of the Advocate-General was obtained to the amendment:—

Held, that consent was not necessary, because, if the Advocate-General was satisfied generally that there was a breach of trust and gave his consent, it was competent to the plaintiffs to specify such instances of the breach of trust as they thought they could prove. **Dhanjibhoy Raghoo v. Meherally Moraj**, 9 Bom. L.R. 901.

CHANDAVARKAR, J.

(264) *S. 530—Suit relating to charity—Suit brought by the Advocate-General at the instance of relators—Dismissal of suit—Right*

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

of appeal—Relators cannot appeal in their own right.

Where a suit filed, under S. 539 of the Code, by the Advocate-General, at the instance of relators, is dismissed, and the Advocate-General does not think fit to appeal, it is not competent to the relators to file an appeal on their own account, against the dismissal. **Jan Mahomed Abdul v. Syed Nurudin**, 9 Bom. L.R. 996.

CHANDAVARKAR and HEATON, JJ.

(265) *S. 539—Dharmasala—Suit for removal of present mahant and appointment of another—Sanction of the Advocate-General, whether necessary.*

S. 539 of the Code is applicable to a suit for the removal of the incumbent mahant of a dharmasala and the appointment of the plaintiff in that place, on an allegation of breach of trust, and the suit is not maintainable without obtaining the previous consent of the Advocate-General. **Dalip Singh v. Ishvar Singh**, 78 P.R. 1907.

KENSINGTON and LAL CHAND, JJ.

References :—29 M. 283 (P.C.), 9 C.W.N. 151, 20 C. 397, 24 C. 418, 21 B. 49, 122 P.R. 1890, and 66 P.R. 1892, R.

(265-a) *S. 539—See No. 99, supra.*

(266) *S. 540—Suit of small cause nature tried as regular suit by mistake by Judge having small cause powers—Decree—Appeal—See Act IX of 1887 (PROVINCIAL SMALL CAUSE COURTS), No. 1, U.B.R. (1907), Provincial Small Cause Courts Act, 1.*

(266-a) *S. 540—See No. 7, supra.*

(267) *Ss. 542 and 584, Scope of—See LIMITATION Act, No. 6, 11 C.W.N. 959 = 6 C.L.J. 237 = 34 C. 941 (F.B.).*

(268) *S. 544, applicability of—Appeal by one of the defendants against the whole decree—Ground common to all the defendants.*

In order to make S. 544 applicable, all that is necessary is that the decision appealed against, should have proceeded on any ground common to all the defendants. There is nothing in the section to warrant the importation into it of the qualifications suggested in 17 M. 265 (a).

Where a person sued for a declaration of his reversionary right to certain properties forming part of the estate of a deceased Hindu, and got a decree in his favour, and one of the defend-

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

ants alone appealed against the whole decree in the first Court, and the lower appellate Court reversed the whole decree of the first Court and dismissed the plaintiff's suit on the ground that he failed to prove his reversionary right, held that the decree of the first Court did proceed upon one ground which was common to all the defendants, viz., that the plaintiff was the reversionary heir of the deceased, and that it was, therefore, competent to the appellate Court, on the appeal of one of the defendants alone against the whole decree, to reverse the decree in so far as it affected the other defendants also, though they had not joined in the appeal. **Dhuttaloor Subbayya v. P. Subbayya**. 17 M.L.J. 119 (F.B.)=2 M. L. T. 104.

SUBBRAHMANIA AIYAR, BENSON, and WALLIS, JJ.

References:—(a) 4 M.H.C.R. 26, 8 M. 192, *Appr.*; 16 M. 293, 28 M. 122, 21 W.R. 112, 30 C. 429, R.; 17 M. 265, *overruled*; 2 W.R. 227; 11 W.R. 238, not F.

(269) S. 545—Order refusing to stay execution—*Appeal*.

No appeal lies from an order under S. 545, Civil Procedure Code, refusing to stay execution. **Cameron v. Bulaki Mal**. 146 P.R. 1907.

KENSINGTON, J.

Reference:—29 B. 71, F.

(269-a) S. 545—See Nos. 8 and 146, *supra*, and No. 270, *infra*.

(269-b) S. 546—Surety for performance of appellate decree, whether, could be proceeded against by way of execution.

Execution for costs, awarded by a decree under appeal, was granted, on the respondent in this case standing surety, for restitution, in the event of the decree being reversed on appeal. The decree having been, subsequently, reversed, the judgment-debtor sought to recover from the surety, by way of execution, the amount paid. *Held*, the order was obviously under S. 546 of the Code and the Full Bench Ruling in **Raghuvar Das v. Saligran** (a) applies equally to S. 545 and to S. 546,—the decision in that case approving 25 B. 409, a case with reference to S. 546 holding that recovery in such a case should be by execution-proceedings. **Deoki Nandan v. Gehna Mal**, 125 P. R. 1906=94 P.L.R. 1907.

REID, C.J.

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

References:—(a) 109 P.R. 1906, 77 P. R. 1895 and 8 A. 689, R.

(270) Ss. 546, cl. (3), 545 and 582—Stay of sale of immoveable property in execution of money-decree—Jurisdiction of Appellate Court in which appeal pending to stay sale—Inherent jurisdiction.

Held, by the majority, that, when an appeal has been preferred against a decree for money, the Appellate Court has jurisdiction, pending the disposal of the appeal, to pass an order staying the sale of immoveable property of the judgment-debtor in execution of the decree. **Tribeni Sahu v. Babu Bhagwat Bux Rai**. 11 C.W.N. 1030 (F.B.)=6 C.L.J. 298=34 C. 1037.

RAMPINI, C.J., and BRETT, MITRA, WOODROFFE, and MOOKERJEE, JJ.

References:—8 C. W. N. 381, 8 C.W.N. 572=31 C. 722, 5 C.W.N. 67=28 C. 734, 3 C.L.J. 29, 33 C. 927=3 C.L.J. 67, R.

(270-a) S. 549—See No. 146, *supra*.

(271) Ss. 551, and 574—Appeal, summary dismissal of—Judgment, requirements of.

Where an appellate Court, other than a High Court, dismisses an appeal under S. 551, it must write a proper judgment.

When, after stating the nature of the appeal, the District Judge says "The lower Court has dealt with all the necessary points and there is no reason shown for differing from the views expressed."

Held, the judgment substantially complied with the requirements of S. 574 (a). **Rakhai Chunder Tewari v. Satindra Deb Rai**, 5 C.L. J. 348.

MACLEAN, C.J., and CASPERSZ, J.

Reference:—(a) 25 C. 97, *Distgd*.

(271-a) S. 552—See No. 76, *supra*.

(272) Ss. 556 and 558—Appeal—Adjournment, Application by pleader for, if appearance—Default—Re-admission, application for.

An application, by a counsel or pleader, who is instructed only to apply for an adjournment, which is refused, is not an appearance, within the meaning of the Code.

When in such circumstances an appeal is dismissed, the dismissal is one for default under S. 556, Civ. Pro. Code, so as to entitle the appellant to apply for re-admission under S. 558 of the Code (a). **Satis Chandra Mukerjee**

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

v. Aparaj Prosad Mukerjee, 11 C.W.N. 329 (F.B.)=5 C.L.J. 247=2 M.L.T. 123=84 C. 408.

MACLEAN, C.J., and HARRINGTON, BRETT,
MITRA and GEIDT, JJ.

References :—(a) 4 C.W.N. 237, overruled;
8 C.W.N. 621, approved.

(273) *S. 558—Appeal dismissed in default—Sufficient cause for re-admission of an appeal.*

Where a District Judge dismissed an appeal in default at 11-30 A.M., and himself left the Court at 12-30 P.M., while the appellant was preparing an application for restoration,

held that this was a sufficient cause for re-admitting the appeal within the meaning of S. 558, Civ. Pro. Code. **Nabi Baksh v. Abu Somad Khan**, 69 P.W.R. 1907.

REID, C.J..

(273-a) *S. 558—See No. 272, supra.*

(274) *S. 559—Respondent getting a decree against a co-respondent.*

A respondent cannot get a decree against a co-respondent, when he has submitted to the decree of the Court of first instance and has not filed an appeal separately. **Lohre v. Sita**, 4 A.L.J. 772.

BANERJI and AIKMAN, JJ.

Reference :—27 A. 23, F.

(274-a) *S. 559—Security for costs against an appellant in forma pauperis—Jurisdiction of Court—Delay.*

Although the Court has jurisdiction to make an order for security for costs against an appellant in *forma pauperis*, such an order should be made under very special circumstances (a).

It is very important that applications of this nature should be made with due promptitude and should not be put in, after the bulk of the costs has been incurred on both sides (b). **Srinivasa Sastriar v. Subramania Aiyar**, 17 M.L.J. 583.

• WALLIS and MILLER, JJ.

References :—(a) 3 M. 66, F. (b) 5 C.W.N. 119 & 33 Ch. D. 76, F.

(274-b) *S. 560—See No. 75, supra.*

(275) *S. 561—Cross objections maintainable only with respect to the principal appeal. Separate appeal with respect to separate orders passed on separate appeals—Deorha*

iv. Pro. Code (Act XIV of 1882).—(Contd.).

provision as to payment of interest in the shape of, whether enforceable—Penalty—Interest—Sum payable over and above the principal sum, validity as to the condition stipulating payment of.

The plaintiffs-respondents filed a suit against the appellant to redeem certain mortgages, one of which contained a stipulation that the mortgagors should pay on redemption the principal sum and half as much again commonly called *deorha*. The plaintiffs contended that they were not bound by the condition for the payment of *deorha*. The defence of the appellant was that the *deorha* was payable and that he was entitled to certain sums on account of improvements effected by him and rent of certain land demised by him to the respondents. The Court of first instance disallowed the *deorha*, but allowed other items on account of improvements and rent. Both parties appealed to the District Judge, the defendant-appellant claiming the *deorha* and objecting to the lower Court's order as to costs. His appeal was dismissed. The plaintiffs in their appeal objected to the items awarded on account of improvements and rent and also as to costs awarded by the lower Court. The District Judge allowed the appeal as to costs only and dismissed the rest of the appeal. The defendant appealed to the Court of the Judicial Commissioner against the dismissal of his appeal by the District Judge. The plaintiffs instead of filing a separate appeal filed objections under section 561, Civil Procedure Code.

Held, that the objections under section 561, filed by the plaintiffs, were inadmissible. They could under section 561 be allowed to object only to the decree against which the appellant was appealing; if they wanted to appeal against the order of the District Judge passed on their appeal, they ought to have filed a separate appeal.

Held, further, that the stipulation for the payment of *deorha* was not in the nature of a penalty and could therefore be legally enforced. **Miran Baksh v. Bajrang Bahadur Singh and others**, 10 O.C. 214.

CHAMIER, C.J.

References :—S.C. A. No. 409 of 1905 and L.R. 2 Ch. App. 542, R.

(276) *S. 561—Omission to file cross-objections in appeal—Incompetency to take such objection in further appeal—See Act X of 1865 (Succession), No. 1, 52-P.W.R. 1907.*

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

(277) *Ss. 561 and 566—Suit for possession—Appeal from decree of Lower Appellate Court—Remand to the Lower Appellate Court—Fresh enquiry—Lower Appellate Court awarding more than the original decree when plaintiff not appealing—Validity.*

The plaintiff sued the defendant, the proprietors of an adjoining estate, for recovery of possession of certain lands, after determination of the boundary between the two estates. The Munsiff partially decreed the suit. The defendant appealed, but plaintiff neither appealed nor filed any objection against the decree of the Munsiff. The decree of the Munsiff was modified by the Lower Appellate Court in favour of the defendant, and, thereupon, the plaintiff appealed to the High Court, which remanded the case and directed a fresh investigation to be made by the Civil Court Amin by comparison of the maps of both the parties. After a fresh enquiry, the Lower Appellate Court passed a decree in favour of the plaintiff, giving him more lands than he recovered in the first Court.

Held, on appeal to the High Court, that, as the plaintiff had not appealed from the judgment of the Munsiff, the Lower Appellate Court had no power to award him more than he recovered in the Munsiff's Court. **Agilul Hosain v. Dino Nath Dutt**, 34 C. 996.

STEPHEN and HOLMWOOD, JJ.

Reference :- 3 A. 643, D.

(278) *Ss. 561 and 622—Decree against one of the defendants—Appeal by him—Plaintiff not appealing nor filing objection under S. 561—Appellant found not liable—Relief against other defendants, whether grantable.*

The plaintiff sued the proprietors and the agent of a firm for the rent of a godown hired by the agent. The Munsiff granted a decree against the agent. Against this decree the agent appealed, but the plaintiff did not appeal, nor did he raise any objection to the decree under S. 561 of the Code. The lower Appellate Court held that the proprietors, and not the agent, were liable and that it had no power to pass a decree against the proprietors.

Held, on second appeal, that the plaintiff was entitled under S. 622 of the Code to ask for a revision. *Held*, also, confirming the decree of the lower appellate Court, that it was not open to the Court to grant any relief to the plaintiff, inasmuch as the granting of such relief was not necessarily incidental to the relief granted to

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

the agent who had appealed (a). **Seth Bindra-bandas v. Moti Lal**, 3 N.L.R. 85.

BATTEN, A.J.C.

References:—28 M. 229, F; 27 A. 23, 28 A. 95, 18 B. 520, 31 C. 643, 9 C.P.L.R. 62 and 14 C.P.L.R. 46, R.

(279) *Ss. 561 and 647—Suit on bond executed by first defendant to second defendant, who transferred it to plaintiff—Decree in lower Court against second defendant only—Revision petition to High Court under S. 25, Act IX of 1887 (Prov. S. C. Courts)—Memorandum of objections, filing of—Procedure—High Court's powers.*

In a suit on a bond, executed by the first defendant, in favour of the second defendant, who transferred it to the plaintiff, the lower Court gave a decree against the second defendant only, against which he presented a Revision Petition under S. 25 of Act IX of 1887; *held* that S. 647 of the Code enables the High Court to apply to Revision Petitions of this kind the procedure applicable to an appeal, and that a memorandum of objections, lies in such Revision Petitions; and that, even apart from the memorandum of objections, the words of S. 25 of Act IX of 1887 are wide enough to empower the High Court, having all the parties before it, to transfer the liability from one defendant to another, even without application by the plaintiff. **Krishna Aiyangar v. Appanaiyengar**, 17 M.L.J. 62.

MILLER, J.

(280) *S. 562 as amended by S. 49 of Act VII of 1888—Remand—Preliminary point—Suit decided with reference to some only of several issues framed, after recording all the evidence—Difference between S. 562, Civ. Pro. Code, as it stood before and after its amendment by S. 49 of Act VII of 1888, pointed out and explained.*

A shop was mortgaged by G and M (deceased), whose representatives were defendants 8 to 12, to G R (deceased), whose representatives were defendants 4 to 7. Defendants 4 to 7 sub-mortgaged to defendant 3, who sold his mortgage rights to defendant 2, who sold the shop to defendant 1.

In 1902, R purchased the equity of redemption from defendants 8 to 12 and sued defendants 1 to 12 for possession as mortgagors of the said shop.

The first Court framed six issues, but the main contention was whether defendants 8 to

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

12 had already sold their rights to G R in 1869. The Munsiff found the sale of 1869 and the successive proprietary titles of defendants 1 and 2 proved and so dismissed the suit. On appeal, the Divisional Judge, finding the sale of 1869 not established, remanded the case under S. 562, Civ. Pro. Code.

In appeal to the Chief Court, it was contended that (1) the case was not decided by the first Court on a preliminary point and (2) the sale of 1869 to G R was not proved.

When the case came on before the Single Bench, the appellant's pleader gave up the first ground of appeal and stated the form of remand was correct. But the counsel of the respondent insisted that this was not so. The Single Bench, consequently, referred the case to the Division Bench for giving a definite Ruling.

Held, that the first Court disposed of the case on a preliminary point, within the meaning of S. 562, Civ. Pro. Code, as amended by S. 49 of Act VII of 1888, although evidence was recorded on the whole case.

Also, the difference between the provisions of S. 562, Civ. Pro. Code, as they stood before and after their amendment by S. 49 of Act VII of 1888 was pointed out and explained. **Nawahu Ram v. Relu Mal**, 27 P.W.R. 1907.

JOHNSTONE and SHAH DIN, JJ.

References:—99 P.R. 1902, 9 A. 30, 27 A. 691, 16 M. 207 and 22 M. 172, *F*; 109 P.R. 1887, 89 P.R. 1891 (**F.B.**), 43 P.R. 1902, Civ. App. No. 535 of 1902 (unpublished), 49 P.L. R. 1905, *R. and D.*, 89 P.R. 1891 (**F.B.**), *doubted*.

(280-a) S. 562—See Nos. 29, 34, 76 and 223, *supra* and No. 301, *infra*.

(281) *Ss. 562 and 564—Erroneous order of remand—Subsequent proceedings, if illegal—Merits of a case—Dispossession, meaning of.*

When a Court of first appeal, purporting to act under S. 562 of the Civ. Pro. Code, remands a case to the Court of first instance, which had not decided the suit merely on a preliminary point, the order is erroneous; but it cannot be said that the subsequent proceedings, before the lower Courts, are void, merely because of such error. If, in consequence of such erroneous remand, there has been a wrong decision affecting the merits of the case, then and then only will the subsequent proceedings be set aside (*a*).

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

Where the Court of first instance originally decreed the plaintiff's suit, but after an erroneous remand, dismissed it.

Held, that the reversal of the former judgment was not a wrong decision affecting the merits of the case.

Before a party can be said to have acquired a title by adverse possession against another, whom he had dispossessed, it is necessary to find, not only that that other has been dispossessed, but that that the party claiming title has been in possession and has exercised rights of possession over the disputed tract. **Durga Kinkar Norha v. Konchai Ronza**, 5 C.L.J. 71.

BRETT and MOOKERJEE, JJ.

Reference:—(a) 28 C. 324, *F*;

(282) *Ss. 562 and 564—Alternative but not co-existent remedy—See APPEAL (GENERAL), No. 5, 6 C.L. J. 547.*

(283) *Ss. 562 and 588—Appeal—Claims inconsistent—Plaint, order rejecting, a decree—Appellate order admitting plaint, not a decree—Second appeal.*

Where the Court of first instance rejected the plaint on the ground that it contained two inconsistent claims, and the Court of appeal held that the plaintiffs were entitled to press both claims in one suit, and directed the first Court to proceed with the trial of the suit on its merits:

Held, on appeal by the defendant, that the order of the Court of first instance was an order rejecting the plaint and, therefore, a decree, and the order of the appellate Court was an order admitting the plaint which not being a decree nor an order under S. 562, Civ. Pro. Code, was not appealable. **Braja Lal Mitra v. Upendra Krishna Mitra**, 6 C.L.J. 214.

RAMPINI and MOOKERJEE, JJ.

(284) *Ss. 562 and 588—Ordinary appeal and appeal under S. 588—Order of remand on appeal—Second appeal.*

Where an order of remand under S. 562 is passed on an appeal under S. 588 of the Code, but not on an ordinary appeal from a decree, a second appeal is barred under the concluding paragraph of S. 588. **Raj Bhai v. Yakub Ali**, 120 P.R. 1907.

RATTIGAN, J.

References:—24 M. 447, 18 A. 88, 26 M. 518, R; 6 C.W.N. 585, *Diss.*

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

(285) *Ss. 562 and 588—Order of remand—Whether appeal lies after suit is finally disposed of.*

An appeal under S. 588, Civ. Pro. Code, cannot be entertained, if preferred after the suit has been finally disposed of by the lower Court. **Salig Ram v. Brij Bilas**, 4 A.L.J. 569 = A.W.N. (1907), 234.

KNOX, A.C.J., and RICHARDS, J.

*References:—*9 C.W.N. 895, F; 12 A. 540, D.
(286) *Ss. 562 and 595—Appeal to Privy Council—Order of remand under S. 562 whether a final decree.*

Where a case was remanded under S. 562 of the Code by the Chief Court, the order of remand cannot be said to be a final decree under S. 595, cl. (a), and an application for leave to appeal to the Privy Council from such order will not be granted under S. 595, cl. (a), even though the value of the suit is sufficient to warrant an appeal. **Sohan Singh v. Jahandad Khan**, 52 P.R. 1907.

JOHNSTONE and RATTIGAN, JJ.

*References:—*1 A. 726, 25 A. 629, 6 B. 260 and 8 B. 548, R, 17 A. 112, *Expl.*

(286-a) S. 564—See Nos. 76, 281 and 282, *supra*.

(287) S. 566—*Remand—Return to remand to be made by the Court originally seised of the case—Jurisdiction.*

Held that, when issues are remitted for trial under S. 566, such issues are triable only by the Court which was originally seised of the case. **Ali Sher Khan v. Ahmad-ullah Shan**, A.W.N. (1907), 209 = 4 A.L.J. 603.

DILLON and GRIFFIN, JJ.

*Reference:—*14 A. 28, F.

(288) S. 566—See PARTIES, No. 1, 20 P.L.R. 1907.

(288-a) S. 566—See No. 277, *supra*.

(288-b) S. 568—See No. 307, *infra*.

(289) *Ss. 568 and 623—Application for review on the ground of discovery of new evidence—Rejection by Court—Application for admission of some evidence in appeal—Jurisdiction of appellate Court to take further evidence—Local investigation by appellate Court, if regular—Extra cursus curiæ—Railway accident—Train overshooting platform—Negligence—Contributory negligence—Arbitration.*

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

The Code of Civil Procedure permits applications for review, on the ground of discovery of new and important evidence, but exacts very strict conditions, so as to prevent litigants lying on their oars when they ought to be looking for evidence. It enjoins the Judge to require the facts as to the absence of negligence to be strictly proved, and it makes the Judge who tried the case final on such applications.

Where such an application for review was refused by the Original Court, but the Court of Appeal, upon a special and preliminary application and before hearing the appeal on the merits, made an order for the admission of "further evidence,"

held that the appeal Court's order was without jurisdiction and that S. 568 of the Code did not apply to such a case.

The legitimate occasion for S. 568 is when, on examining the evidence as it stands, some inherent *lacuna* or defect becomes apparent, not where a discovery is made, outside the Court, of fresh evidence, and the application is made to import it. That is the subject of the separate enactment in S. 623.

In a suit for damages for injuries sustained by a passenger one evening, in alighting from a railway train which had overshoot the platform, one of the questions was whether there was sufficient light at the time to enable a passenger of ordinary carefulness to alight safely. The Court of first instance decided on the evidence that the light was not sufficient, and that the plaintiff's injuries were not due to his own negligence. On appeal, the Appellate Court visited the spot on a day and at a time when the "conditions in question would be as nearly as possible exactly reproduced," and on the impression left on its mind by viewing the place and without reference to the evidence adduced, held that the accident must be attributed to the plaintiff's own negligence.

Held, that the procedure adopted was contrary to law, and one that ought not to be followed.

Held, further, that the fact that the Counsels of both parties acceded to the appellate Court's suggestion of viewing the locality did not constitute the proceeding an arbitration and make the decision non-appealable. **Kesowji Issur v. The Great Indian Peninsula Railway Company**, 11 C.N.W. 721 (P.C.) = 6

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

C.L.J. 5=4 A.L.J. 461=9 Bom. L.R. 671=17 M.L.J. 347=81 B. 381=2 M.L.T. 435.

LORD ROBERTSON, LORD COLLINS and SIR ARTHUR WILSON.

(289-a) S. 569—See No. 307, *infra*.

(289-b) S. 578—See No. 271, *supra*.

(290) S. 578—*Irregularity—Disposal of a suit on a Sunday.*

Held, that the disposing of a civil suit on a Sunday is a mere irregularity, which is covered by the provisions of S. 578 of the Code. **Sheo Ram Tiwari v. Thakur Prasad**, A.W.N. (1907), 168=29 A. 562.

GRIFFIN, J.

References:—9 A. 366, 16 W.R.C.R. 230, R.

(291) S. 578—Recording evidence in English in ejectment suit—*Irregularity*—See LANDLORD and TENANT, No. 9, 34 C. 396.

(291-a) S. 578—See Nos. 29, 42 and 74, *supra*.

(291-b) S. 582—See Nos. 204, 207, 208, 209 and 270, *supra*.

(292) Ss. 582 and 587—Second appeal—Death of respondent—Application by appellant for substitution of heirs—See LIMITATION ACT, No. 121, 11 C.W.N. 1100=6 C.L.J. 715=34 C. 1020.

(293) S. 583—*Execution of decree—Restitution of property sold in execution of a decree reversed in appeal—Procedure.*

In a suit for a declaration that certain property belonged to the defendant judgment-debtor, the plaintiff decree-holder obtained a decree and proceeded, on the strength thereof, to sell the property. In appeal, however, this decree was reversed. The rightful owner of the property sold then applied to the Court for restitution of the property. *Held*, that, whether the application could or could not be considered as one falling strictly within the terms of section 583 of the Code, the applicant was entitled to restitution. **Shiam Sundar Lal v. Kalsar Zamani Begam**, A.W.N. (1906), 315=4 A.L.J. 19=29 A. 148.

KNOX and RICHARDS, JJ.

Reference:—6 C.W.N. 710, R.

(293-a) S. 583—See No. 141, *supra*.

(294) S. 584—*Second appeal—finding of fact—Petition for mutation reciting a gift—Evidence of gift disbelieved.*

In a suit for possession by the daughters of one A, the sons set up an oral gift in their

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

favour by the father. They put in evidence a copy of a petition for mutation of names filed by A in their favour, which said that A had made a gift of that property in favour of his sons and widow, and that their names may be entered accordingly. Witnesses were also produced to prove the gift, but were not believed by the Courts below. *Held*, that the petition for mutation of names did not amount to a gift, and the question was not a question of construction of the petition, but a question as to the effect to be given to that petition as evidence of gift, and the finding that there was no gift was a finding of fact, and could not be disturbed in second appeal (a). **Parbati Kuar v. Mahmood Fatima**, 4 A.L.J. 121=A.W.N. (1907), 36=29 A. 267.

STANLEY, C.J. and BURKITT, J.

Reference:—(a) 22 C. 609, It.

(294-a) Ss. 584, 591, 623 and 629—*Review of judgment granted for "any other sufficient reason"—Objection against the order in appeal from final decree.*

Ss. 584 and 591 of the Code do not control S. 629, so as to confer a right of appeal in a case, where the appeal is not based on one of the objections mentioned in S. 629.

An objection against the order of admission of an application for review of judgment cannot be taken in an appeal against the final decree except on one of the grounds mentioned, as grounds of objections in S. 629.

Where an application for review of judgment is granted for "any other sufficient reason" under S. 629 of the Code, the sufficiency or otherwise of the reason is not a good ground of appeal against the order (a). **Gopala Aiyar v. Ramaswami Sastrial**, 17 M.L.J. 603.

WHITE, C.J., and BENSON, J.

References:—(a) 27 A. 695, 24 C. 878, F; 23 M. 314, D.

(295) S. 584—Second appeal—Error of law—See EVIDENCE ACT, No. 9, 11 C.W.N. 230.

(295-a) S. 584—See Nos. 29 and 267, *supra*.

(296) S. 586—*Suit for rent and for a declaration as to the propriety of patta tendered to the tenant—Small Cause Suit—Second appeal.*

Where, in a suit for rent under Rs. 500, the landlord sued for a declaration as to the propriety of the patta tendered to the tenant and for the recovery of the rent, *held*, that, as the

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

plaintiff could have obtained all the relief which he sought in his suit without asking for a declaration, the prayer for a declaration does not prevent the suit being of the nature cognizable in a Small Cause Court, within the meaning of S. 586 of the Code and that no second appeal lies in such a case. **Ramachandrayar v. Mir Muhammed Noorulla Sahib**, 1 M.L.T. 314 (F.B.)=16 M.L.J. 477=30 M. 101.

WHITE, C.J., BENSON and WALLIS, JJ.

(296-a) S. 586—See No. 142, *supra*.

(297) Ss. 586, 588, cl. (28)—Appeal from order of remand in Small Cause suit—See LIMITATION ACT, No. 64, 11 C.W.N.862.

(297-a) S. 587—See Nos. 209 and 292, *supra*.

(297-b) S. 588—See Nos. 76, 84, 140, 180, 283, 284 and 285, *supra*.

(297-c) S. 588 (b)—See No. 41, *supra*.

(297-d) S. 588 (c)—See No. 7, *supra*.

(297-e) S. 588 (8)—See No. 66, *supra*.

(297-f) S. 588 (16)—See No. 179, *supra*.

(297-g) S. 588 (18)—See No. 205, *supra*.

(297-h) S. 588 (28)—See No. 297, *supra*.

(297-hh) S. 591—See No. 294-a, *supra*.

(297-i) S. 592—See No. 22, *supra*.

(298) S. 595—Final decree passed on appeal—High Court—Appeal—Privy Council—High Court's order refusing to admit appeal beyond prescribed period.

An order passed by the High Court, refusing to admit an appeal presented beyond the prescribed period, is not a "decree passed on appeal" under S. 595 (a) of the Civ. Pro. Code, and is, therefore, not appealable to His Majesty in Council (a). **Karsondas Dharamsey v. Gangabai**, 9 Bom. L.R. 566. (On appeal from 7 Bom. L.R. 965=30 B. 329).

JENKINS, C.J.; and PRATT, J.

Reference :—(a) 30 C. 679, F.

(298-a) S. 595—See No. 286, *supra*.

(299) S. 596—Appeal to Privy Council—Costs, different judgments about—Affirming the decision of the Court below—Discretionary power of Court to award costs.

Held, that the last clause of S. 596, Civ. Pro. Code relates to the subject matter of the suit and therefore there is no right of appeal when the two Courts differ only as to costs. **Thakur Baldeo Bakhsh Singh v. Thakur Lalji Singh**, 10 O.C.65.

CHAMBER and GRIFFIN, J.CS.

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

Reference :—8 C.W.N. 294, Diss.

(300) S. 596—Several suits dealt with in same judgment—Aggregate value—See APPEAL TO PRIVY COUNCIL, No. 1, 34 C. 400.

(300-a) Ss. 596 and 598—Leave to appeal to his Majesty in Council, application for—"Substantial question of law," meaning of—Questions of general importance or of general interest.

Held, that the words "substantial question of law" in S. 596, Civil Procedure Code, mean question of general importance; they do not include a question of the construction of a document in which the parties alone are interested. If no such question is shown to exist leave to appeal to His Majesty in Council cannot be granted (a). **Udairaj Singh (Babu) and others v. Raja Bhagwan Bakhsh Singh**, 10. O.C. 308.

CHAMBER, J.C.

Reference :—(a) 11 C.W.N., CCXVIII, F.

(301) Ss. 596 and 562—Appeal to His Majesty in Council—Appeal from order of remand not usually admissible.

An order under section 562 of the Code is not ordinarily capable of being the subject of an appeal to His Majesty in Council, though it may possibly be so, if the order in question has the effect of deciding finally the cardinal point in the suit. **Ram Sarup v. Ram Dei**, A.W.N. (1907), 291.

STANLEY, C.J., and BURKITT, J.

Reference :—A.W.N. (1903) 159, F; 2 C.W.N., p. CCI, F.

(301-a) S. 598—See No. 300-a, *supra*.

(302) S. 602—Privy Council—Appeal by special leave—Practice—Time for depositing estimated costs—Extension.

Although S. 602 of the Code only applies to a case, where a certificate of leave to appeal to the Privy Council has been granted by the High Court, it has been the invariable practice of the Calcutta High Court to treat that section as applying to cases, where special leave has been granted by the Privy Council.

The High Court has power to extend the time, as provided by S. 602 of the Code, for depositing the estimated cost of translating, transcribing, indexing and transmitting to the Privy Council the record of a case under appeal, but it ought not to do so without some cogent reason (a). **Roy Jotindra Nath Chowdhury v.**

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

Rai Prasanna Kumar Banerjee Bahadur, 11 C.W.N. 1104.

MACLEAN, C. J., and GEIDT and WOODROFFE, JJ.

Reference :—(a) 10 C. 557, *F*'.

(302-a) S. 617—See No. 236, *supra*.

(303) S. 622—*High Court's power to revise proceedings in the Bombay Court of Small Causes—Presidency Small Cause Courts Act, S. 9—Charter Act.*

The High Court, in the exercise of superintending powers under its extraordinary jurisdiction, will not ordinarily interfere, except in cases of grave and otherwise irreparable injustice. **Ismalji Ibrahimji Nagree v. N. C. Macleod**, 8 Bom. L.R. 969=31 B. 138.

RUSSELL, C.J., and BEAMAN, J.

(304) S. 622—*Revision—Omission to consider part of defence owing to an erroneous view of law—Jurisdiction.*

Held, that, where a Subordinate Court declines to consider a certain part of the defence, owing to an erroneous view of law, such Court should be deemed to have failed to exercise jurisdiction vested in it by law, and its decision can be revised by the High Court under S. 622. **Ghisa v. B. Shukdeo Singh**, 10 O.C. 8.

CHAMBER, J.C.

(305) S. 622—*Court—Whether District Registrar a Court.*

The word "Court" in S. 622 of the Code should be understood, in its ordinary legal sense, as "a place where justice is judicially administered."

A District Registrar is not a Court within the meaning of S. 622. **Manavala Goundan v. Kumarappa Reddi**, 17 M.L.J. 313=2 M.L.T. 267=30 M. 326.

SUBRAHMANIA AIYAR, J.

(305-a) S. 622—See Nos. 14, 77, 94, 163, 169, 190, 202, 238 and 278, *supra*.

(306) Ss. 622, 623, 626 and 629—*Review of judgment—Application for review rejected—Revision—Small Cause Court suit.*

An Application for review of judgment in a Small Cause Court suit was rejected, wrongly, on the ground of a supposed deficiency in the Court fee paid upon the application. *Held* that this order was open to revision. **Willis v. Jawad Husain**, A.W.N (1907), 132=4 A.L.J. 439=29 A. 468.

RICHARDS, J.

Civ. Pro. Code (Act XIV of 1882).—(Contd.).

Reference :—26 A. 572, *D*.

(307) Ss. 622, 647, 568 and 569—*Revisability of proceedings under S. 195, Crim. Pro. Code, before Judges of Civil Courts—See SANCTION TO PROSECUTE, No. 4, 2 M.L.T. 84=17 M.L.J. 123=30 M. 311=5 Cr. L.J. 288.*

(307-a) S. 623—*Discovery of favourable decision of superior Court, whether good ground for grant of review.*

The respondents obtained a decree for pre-emption of part of the property sold in the case. The judgment was erroneously passed, in accordance with a case subsequently found to have been overruled by a Full Bench decision passed prior to the wrong judgment but not brought in time to the Court's notice. Under the ruling of the Full Bench, appellants should have obtained decree for the whole of the property in question; so, they applied for a review on that ground. *Held*, the fact that the appellants were deprived by the original decree of what they were entitled to, according to the then existing judicial decisions, constituted a miscarriage of justice, affording ground for a review. **Sujan Singh v. Fatah Muhammad**, 124 P.R. 1906=97 P.L.R. 1907.

REID, C.J.

References :—6 A. 292, *F*'; 14 C. 627, *D*.

(307-b) S. 623—See No. 294-a, *supra*.

(308) S. 623, inapplicability of, proceedings under the Guardian and Wards Act, 1890—See ACT VIII of 1890 (GUARDIANS AND WARDS), No. 2, 143 P.R. 1906=2 P.W.R. 1907.

(308-a) S. 623—See Nos. 289 and 306, *supra*.

(309) Ss. 623 and 626—*Review of judgment—Appeal—Second appeal.*

When an order granting a review of judgment has been set aside on appeal, the order passed in appeal is final and not open to second appeal. **Jainal Bibi v. Abdul Jalil**, 6 C.L.J. 225.

RAMPINI and MOOKERJEE, JJ.

(309-a) S. 624—*Review—Power of a succeeding Judge to review order of his predecessor.*

A divisional Judge dismissed an appeal for default. His successor in office allowed a review of the order dismissing the appeal on the ground that it was passed in the absence of the appellant and without giving him notice of the hearing of the appeal. The question for decision was whether the successor had power to review

Civ. Pro. Code (Act XIV of 1882).—(Concl'd.).

his predecessor's order on the ground above mentioned. *Held*, that the order admitting the review was illegal. **Bahadoo v. Fattah Khan**, 82 P.R. 1906=107 P.L.R. 1907.

REID, C.J.

Reference:—23 C. 115, *Diss.*

(309-b) S. 626—See No. 306, *supra*.

(309-c) S. 629—See Nos. 294-a, 306 and 309, *supra*.

(309-d) S. 639—See No. 8, *supra*.

(309-e) S. 640—See No. 76, *supra*.

(310) S. 646 B—Scope of—Jurisdiction of appellate tribunal—See ACT IX OF 1887 (PROVL. S.C. COURTS), No. 1-a, 1 M.L.T. 414=30 M. 41.

(310-a) S. 647—See Nos. 8, 67, 77, 78, 158, 279 and 307, *supra*.

(310-b) S. 648—See No. 237, *supra*.

(310-c) S. 649—See No. 96, *supra*.

(311) S. 652—Power of High Court in framing rules under—See HIGH COURT RULES (BOMBAY), No. 2, 9 Bom. L.R. 1138=2 M.L.T. 410 (F.B.).

Civ. Pro. Code (Travancore).

(1) **Tiruppuvaram**—Meaning and history of—Suit to recover arrears of—Government sanction whether necessary for suit—Civil Pro. Code (Regulation II of 1070), S. 7A.

Where a suit to recover the arrears of Tiruppuvaram was dismissed on the ground that, in that particular case, it was one charged on Viruthi land, and that a benefit arising out of such land could not be made the subject of a suit in a Civil Court without Government sanction under Reg. II of 1070. S. 7 A, *held*,

Tiruppuvaram right is revenue payable to the sirkar by the holders of the land in favour of a third party; or the interest on money lent to the sirkar by the said third party, which the sirkar pays off in this way; or it is the Michavaram due to the third party who was the original Jenmi; or a portion of the rent due by some tenant to the sirkar, directed by the sirkar to be paid to private individuals or communities, who erect temples or charitable institutions and apply to the sirkar for assistance.

It being a payment recognised by the sirkar in its own Ayacut accounts, no previous sanction by Government is necessary under S. 7 A, Reg. II of 1070, and the person entitled to receive it can sue in the Civil Courts, as if for rent due from a tenant (a).

Civ. Pro. Code (Travancore).—(Concluded).

The permission of the Government is required only in the following two cases(a):—

(1) Where the Government is to be charged with any liability to pay any grant of the pensions or land revenue;

(2) In the case of service inams, Kandukrishi and Viruthi lands, where the lands themselves are sought to be made liable or alienated by a decree of Court.

The question whether three or twelve years is the period of limitation for a personal remedy against the tenant for recovering Tiruppuvaram arrears never seems to have been considered and decided. **Murthi Sridharar Nampuripad v. Sankaran Govindan** (b), 22 T.L.R. 1.

SADASIVA AIYAR, C.J., and EAPEN, J.

References:—(a) 10 A. 396 (398), 1 B. 523, 16 B. 537, 22 B. 496, 29 B. 480, 2 M. 294, 5 M. 302, 11 M. 283, 8 I. A. 77, R; (b) 7 A. 502, 22 B. 846, 12 C. 389, 15 C. 542, 10 M. 100, 11 T.L.R. 74, 15 T.L.R. 114, 16 T.L.R. 175, 17 T.L.R. 66, 19 T.L.R. 49 (50), R; 18 T.L.R. 103, D.

(2) *Ss. 225 and 238—Order under S. 225—Dispute between two rival representatives—Right of appeal.*

Orders under S. 225, C.P.C., are also orders under the last clause of S. 238, C.P.C. (corresponding to S. 244 of the British Indian Code), and a dispute between two rival representatives is also one under S. 238, C.P.C. An appeal does lie from such orders as if they were decrees (a). **Kanaku Keralan Govindan v. Kanaku Keralan Govindan**, 22 T.L.R. 172.

SADASIVA IYER, C.J., and GOVINDA PILLAI and PADMANABHA IYER, JJ.

References:—16 T.L.R. 43 and 14 T.L.R. 152, *Overruled*. 2 Bom. L.R. 887, R.

(3) S. 238—See No. 2, *supra*.

Civil Rules of Practice (Madras).

Application for order absolute not in accordance with the Civil Rules of Practice—Step in aid of execution—See LIMITATION ACT, No. 138, 17 M.L.J. 596.

Clog.

(1)—on redemption, covenant to renew mortgage perpetually is a—See MORTGAGE (REDEMPTION), No. 61, 16 M.L.J. 462=1 M.L.T. 426=30 M. 61.

Co-emption.

Right of—See ACT II OF 1905 (PRE-EMPTION, PUNJAB), No. 2, 83 P. R. 1907.

Coinage Act

See ACT XXIII OF 1870.

Coinage and Paper Currency Act.

See ACT XXII OF 1899.

Commission.

—to examine accounts—Powers and duties of Commissioner—See CIV. PRO. CODE, No. 221, 6 C.L.J. 105.

Commutation.

(1)—of rent in kind (*bhowli*) into rent in money (*nakdi*)—Court of Wards, power of, to make such commutation—Benefit of estate—Court of Wards Act (IX of 1879, B.C.), Ss. 14, 18 and 19—Bengal Tenancy Act (VIII of 1885), S. 40—Commutation, permanent or temporary how ascertained—Onus—Substitution made by Court of Wards, if binding and upon whom.

The powers of the Court of Wards are co-extensive with the powers of the proprietor of the estate in charge of the Court, subject to the qualification that the exercise of such powers is requisite for the proper care and management of the property of which the Court has taken charge (a).

Commutation of rent in kind into rent in money is in substance nothing beyond a variation of a condition of the lease under which the tenant holds and of the mode in which the rent is to be paid, and such an act by the Court of Wards, may be done for the benefit of the property and the advantage of the ward, and is not *ultra vires*. It is binding both upon the disqualified proprietor, as well as upon his successor, as though it had been that of his predecessor in title, unless the successor can show that the power of the Court to bind him was restricted in some particular way.

Per Mookerjee, J.—Every contract is *prima facie* permanent and irrevocable, and it lies upon a person who says that it is revocable or determinable, to show either some expression in the contract itself or something in the nature of the contract, from which it is reasonably to be implied, that it was not intended to be permanent and irrevocable, but was to be, in some way or other, subject to determination. The contract may, for instance, be shown to be for a limited time, terminable upon the happening of a particular contingency or terminable at the option of either party upon reasonable notice. In each case, however, it lies upon the party who asserts that the contract is terminable to show how and in what manner it is revocable or determinable (b).

Commutation.—(Concluded).

A commutation of rent may be permanent, so that one of the contracting parties cannot, without the consent of the other, insist on reverting to produce rents. The question in each case is what was the intention of the parties; if they intended that the novation should be temporary, in other words, that the substituted agreement was to last for a specified period or during the continuance of specified circumstances, or that either party could resile from the substituted agreement, with or without notice either party may claim to revert to the original agreement. If, on the other hand, no such intention is proved, the substituted agreement can be annulled only by consent of both the parties (c). **Kashi Mahton v. Maharaja Iswari Prasad Narain Deo**, 6 C. L.J. 727.

STEPHEN and MOOKERJEE, JJ.

References :—(a) 23 A. 394, D; (b) 8 Ch. 942 (949), 4 C.L.J. 537 (542) and 3 C.W.N. 151, R; (c) 6 C.L.J. 369 and 21 W.R. 438, R.

(2)—of *bhowli* into *nagdi* rent—re-conversion—See LANDLORD AND TENANT, No. 20, 6 C.L.J. 369.

Companies Act.

See ACT VI OF 1882.

Compensation.

(1)—for non-delivery of goods, suit against a carrier for, governed by Art. 31 of the Limitation Act—See LIMITATION ACT (XV OF 1877), No. 62, 108 P.R. 1906=2 P.L.R. 1907=30 P.W.R. 1907.

Compromise.

(1)—by limited owner such as widow or daughter—Effect on reversioners—See HINDU LAW (CONVERSION), No. 1, 4 A.L.J. 365= A.W.N. (1907), 151=29 A. 487.

(2) Suit by reversioner to set aside alienation by widow—Compromise by reversioner—Right of reversioner's son to question alienation—See RES JUDICATA, No. 10, 37 P.R. 1907.

(3)—decree giving mortgage-decree for debt not secured by mortgage, validity of—Public policy—Minority of some of the defendants—See CIV. PRO. CODE, No. 218, 17 M.L.J. 200.

(4)—on behalf of an infant sanctioned by Court, if can be set aside—See CIV. PRO. CODE, No. 234, 11 C.W.N. 178.

Compromise.—(Concluded).

(5) Validity of, relating to matter outside the scope of suit—See CIV. PRO. CODE, No. 214, 5 C.L.J. 15.

(6)—decree containing reliefs not covered by suit, validity of—See CIV. PRO. CODE, No. 218, 17 M.L.J. 255.

(7) Widow getting enlarged estate under a—See HINDU LAW (WIDOW), No. 11, 17 M.L.J. 243.

(8) Suit on bond to recover money of which a third party had the benefit—Compromise of suit—Suit to recover money paid under compromise—See LIMITATION ACT, No. 68, A.W.N. (1907), 214.

(9) Petition of, containing recital of a previous oral agreement for lease—Stamp—Registration—See REGISTRATION ACT (III OF 1877), No. 4, 12 C.W.N. 59.

Compromise decree.

(1) *Effect of, although the compromise is unregistered—Suit based on right of Jalkar.*

The plaintiffs brought a suit against the defendants, claiming damages from them for fish, which they had wrongfully caught in a Jalkar. The claim was fixed at Rs. 200. Before the case was disposed of, both the parties came to a compromise, under which it was agreed that the plaintiffs should recover the sum of Rs. 60 only as compensation, and that the plaintiffs would give, and the defendants would accept, a permanent lease of the fishery at a fixed rent of Rs. 413 a year. A decree was passed on the basis of the compromise. *Held* that, in execution of the decree itself, the amount agreed to be paid as damages could alone be recovered from the defendants. The Court executing that decree would not be empowered under it to compel the defendants to execute a Kambliat in favour of the plaintiffs, or to accept a lease on the terms agreed to. But, as the *solenama* embodied the agreement entered into by the two parties, on the basis of which both parties entered into compromise in that case, and as the agreement on the defendant's part to take the permanent lease at the rental fixed must be taken to have formed one of the grounds, which induced the plaintiffs to accept as damages a sum less than the amount claimed in the suit, the defendants must be held to be bound by that agreement embodied in the *solenama*, and that no objection could be taken to the admissibility of the *solenama* on

Compromise decree.—(Continued).

the ground of its being unregistered. **Jasimuddin Biswas v. Bhuvan Jelini**, 34 C. 456.

BRETT and SHARFUDDIN, JJ.

(2) *Setting aside of, on ground of fraud or mistake.*

Although a person, under the mistaken belief that he had been sued upon a genuine note executed by him, consented to a decree for the amount sued for, the circumstances that that person neglected to exercise due care and satisfy himself that the note sued on was not genuine, does not deprive him of his right to set aside the compromise decree, if it is found that he was inveigled into the compromise by the fraud of the other party. **Raghavachariar v. Thiruvengkatasami Iyengar**, 17 M.L.J. 82.

SUBRAHMANYA Aiyar and SANKARAN NAIR, JJ.

References.—2 Sm. L.C. 409, D; (1895) A.C. 273, compared.

(3) *When binding—Extraneous properties, effect upon, of compromise decree—Interest*
—*Res judicata—Registration Act, S. 17.*

A petition of compromise, in so far as it relates to properties in suit, does not require registration under S. 17 of the Registration Act, and the decree, in so far as it gives effect to the settlement touching such properties, operates as *res judicata*. If it gives effect to the settlement touching properties extraneous to the litigation, the decree is, to that extent, without jurisdiction and is inoperative. In relation to these extraneous properties, the parties must fall back upon the petition itself, which cannot, without registration, effectively declare or create title to immoveable property exceeding Rs. 100 in value (a). **Gurdeo Singh v. Chandrikah Singh and Chandrikah Singh v. Rash Behary Singh**, 5 C.L.J. 611.

MOOKERJEE and HOLMWOOD, JJ.

References:—(a) 26 I.A. 101=22 M. 508; 1 C.L.J. 388; 30 C. 783; 20 M. 365; 25 M. 553; 25 M. 7. R. 28 A. 78, *disapproved*.

(4) *Transfer of Property Act, S. 89, decree not in accordance with—Agreement of parties, enforcement of—Execution—Application under S. 89 whether necessary—Court's jurisdiction—Cursus curiarum—Civil Procedure Code, S. 284—Attachment before sale.*

The rights of the parties as between themselves having been settled by an agreement and the agreement not being void, it is for the Court

Compromise decree.—(Concluded).

to determine in what way justice should be done to the parties (a).

By a *solenama* (deed of compromise), the defendant agreed that a certain sum of money found to be due to the plaintiff should be paid in instalments up to a certain year, the instalments being specified in the *solenama*. He further agreed that the mortgaged property should be sold in default of payment. The Court directed that the decree be drawn up in terms of the *solenama*. The *solenama* was treated as a part of the decree and the decree stated that the amount should be payable in certain years, and that, on failure to pay any one instalment, the whole amount would become due, and the mortgaged property would, in the meantime, remain hypothecated, and that, on failure to pay the money covered by the instalments, the mortgaged property should be sold for realization of the amount:

Held, that the agreement of the parties has been expressed in proper form, though the form is not strictly in accordance with the Transfer of Property Act. There is no law which says that the decree should not be in such a form. The decree is a valid one, and the mortgaged property should be sold to satisfy the decretal amount. Whether an order under S. 89 of the Transfer of Property Act is necessary or not, the Court has general jurisdiction to direct a sale of the property, either under S. 284 of the Civil Procedure Code, or under S. 89 of the Transfer of Property Act or under the two sections together. Such execution accords with the *cursus curiæ*.

S. 89 of the Transfer of Property Act contemplates a certain state of things, but where such a state of things does not exist that section does not exclude other ways of enforcing a decree, if such a decree is otherwise valid in law.

Held further, having regard to the form of the decree, it is not necessary that there should be an attachment before sale. **Abir Paramanik v. Jahar Mahammad Mondol**, 6 C.L.J. 95 = 11 C.W.N. 879 = 34 C. 886.

• MITRA and CASPERSZ, JJ.

References:—(a) L. R. 5. P.C. App. 516; and 2 I.A. 219 = 15 B.L.R. 383 = 24 W.R. 193, R.

(5) Condition restraining alienation in—See RESTRAINT ON ALIENATION, No. 1, 10 O.C. 136.

Conditional sale.

(1)—of moveable property—Bond—Effect of non-payment of debt within time limited.

Conditional sale.—(Concluded).

The owner of an elephant, to secure repayment of a small sum of money which he had borrowed, executed a bond, by which he agreed that, if the debt with interest was not repaid within a time specified, the elephant should become the property of the creditor. The elephant was handed over to the creditor. After the time limited in the bond had expired, the elephant was sold as the property of the debtor, for arrears of Government revenue due by the debtor. The creditor then sued to recover the money he had lent. *Held*, that the suit was not maintainable. Under the terms of the bond, the elephant had become the property of the creditor and the debt was extinguished. **Udit Narain Miser v. Sheo Narain Kurmi**, A.W.N. (1907), 93 = 4 A.L.J. 340.

STANLEY, C.J., and BURKITT, J.

Confiscation.

Maintenance grant to younger members of Raj—Confiscation of Raj by Government—Effect on grantees—Restoration of Raj—See MAINTENANCE, No. 1, 11 C.W.N. 655.

Consideration.

(1) Difference between value of property and—See TRANSFER OF PROPERTY ACT, No. 22, 17 M.L.J. 11.

(2) Fraudulent transfer of moveable property—Portion of the debts discharged by part of the consideration for the deed of assignment—Validity of the transaction in part—See TRANSFER OF PROPERTY ACT, No. 21, 16 M.L.J. 427 = 1 M.L.T. 351 = 30 M. 6.

(3) Evidence as to payment of—See EVIDENCE ACT, No. 15, 4 A.L.J. 441.

(4) Effect of non-payment of—See MORTGAGE (GENERAL), No. 18, 59 P.R. 1907.

(5) Absence of, in sale-deed—Deed acted on—Intention of transferee—Effect of deed—See SALE-DEED, No. 4, 17 M.L.J. 386.

Construction.

- 1.—(of Acts).
- 2.—(of Decree).
- 3.—(of Deeds).
- 4.—(of Wills).
- 5.—(of Words).

—————1.—(of Acts).

Stamp Act—Reasonable doubt whether a paper is subject to stamp at all—Court should

Construction.—(Continued).———**1.—(of Acts).**—(Concluded).

decide against the exchequer and in favour of the subject—See **STAMP ACT**, No. 1, 9 Bom. L.R. 1034.

(2) "Person whose immoveable property has been sold" in S. 810 A, Civ. Pro. Code—See **CIV. PRO. CODE**, No. 174, 17 M.L.J. 127.

(3)—where language used is of doubtful import—See **VALUATION OF SUITS**, No. 1, 6 C.L.J. 255.

(4) Presumption against sudden change of policy by the Legislature—Presumption in favour of previous judicial interpretation being maintained—See **LIMITATION ACT**, No. 104, 11 C.W.N. 1005 (P.C.).

(5) See **CIV. PRO. CODE**, No. 162, 6 C.L.J. 130.

(6) A remedial measure must be liberally construed so as to advance the remedy—See **ACT II OF 1906 (MAMLATDAR'S COURTS ACT)**, No. 3, 9 Bom. L.R. 1179.

(7) Statute of limitation—See **ESTOPPEL**, No. 2, 6 C.L.J. 621.

(8) Relaxing or avoiding Indian Statute Law by applying principles of equity—See **EVIDENCE ACT**, No. 16, 3 N.L.R. 19.

———**2.—(of Decree).**

(1) *Appeal dismissed or accepted "with costs"*—*Meaning of.*

Where the words of a decree are open to doubt, that construction must be placed on the words used, which does not impose a liability on the judgment-debtor, which is not in express and specific terms imposed upon him. If, therefore, an appeal is dismissed or accepted "with costs," *simpliciter*, the proper interpretation of the words "with costs" is that the costs of the appellate Court alone are awarded, and not the costs of the lower Court. **Bakshi Ram v. Gumano**, 18 P.R. 1907=50 P.L.R. 1907.

CHATTERJI and RATTIGAN, JJ.

References:—45 P.R. 1877, F; 19 W.R. 152, D.

(2) Formal order not drawn up under S. 210, Civ. Pro. Code—See **CIV. PRO. CODE**, No. 92, 5 C.L.J. 25.

(3) Decree imposing a condition—Construction—See **LIMITATION ACT**, No. 137, 17 M.L.J. 566.

Construction.—(Continued).———**3.—(of Deeds).**

(1) *Considerations in—*

In construing expressions in deeds, a consideration is necessary of the entire contents of the deed and such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts. This is an important rule of construction that a passage is best interpreted by reference to what precedes and what follows it (a). **Dhondu Pandit v. Mahant Daulatpuri**, 3 N.L.R. 97.

DRAKE-BROCKMAN, O.J.C.

References:—(a) 22 A. 149, 2 N.L.R. 57, 6 M.I.A. 526, R.

(2) *Power of attorney, construction of—Daughter's estate—Mortgage—Execution sale—whether whole or limited estate passed—Depends on the question whether mortgage was executed for a purpose binding on the inheritance.*

Where an act, purporting to be done under a power of attorney, is challenged as being in excess of the authority conferred by the power, it is necessary to show that, on a fair consideration of the whole instrument, the authority in question is to be found within its four corners, either in express terms or by necessary implication (a).

Where, in a power of attorney, it was provided that S as a general agent might sign for his principal, in his own pen, all deeds of mortgage and simple bonds and that he might get the same attested by witnesses on his own admission and might admit the execution thereof in the office of the Registrar:

Held, that the only authority conferred on the agent was that he should be in a position to sign for the principal the mortgage and simple bonds. This did not authorise the agent to enter into a mortgage transaction without the knowledge of the principal.

When a mortgage was executed on behalf of a Hindu daughter, and the language used in the mortgage suit, in the course of execution proceedings, in the order for the confirmation of the sale, and in the sale certificate, is consistent with either view, namely, either that the whole estate or that the limited and restricted estate passed the question, what passed at the execution sale, depends upon the question whether the mortgage was executed for purposes which would make it binding upon

Construction.—(Continued).———**3.**—(of Deeds).—(Concluded).

the inheritance. **Roy Radha Kissen v. Nauratan Lall**, 6 C.L.J. 490.

BRETT and MOOKERJEE, JJ.

Reference:—(a) (1893) A.C. 170, F.

(3) Duty of Court where document has been wrongly construed so as to affect the interest of the party so construing—See MORTGAGE (REDEMPTION), No. 15, 4 A.L.J. 375.

(4) Intention of parties—Evidence—See TRUSTEE, No. 1, 9 Bom. L.R. 514.

———**4.**—(of Wills).

(1) Clause in will containing direction as to accumulation—See HINDU LAW (WILL), No. 1, 11 C.W.N. 65=34 C. 5.

(2) Will—Gift to daughter followed by a gift to her sons after her death—Absolute estate—See ACT X OF 1865 (SUCCESSION), No. 7, 12 C.W.N. 44.

———**5.**—(of Words).

(1) Interpretation of the word "Malik"—See HINDU LAW (WILL), No. 2, 4 A.L.J. 68.

(2) Meaning of the word 'Rent' in the Bengal Tenancy Act—See ACT VIII OF 1885 (BENGAL TENANCY), No. 17, 11 C.W.N. 110=5 C.L.J. 69.

(3) Meaning of "annual net profits of mines," "owner of mines," "occupier"—See ACT IX OF 1880 (ROAD CESS, BENGAL), No. 3, 5 C.L.J. 148.

(4) "Bandhuvalus," meaning of—See HINDU LAW (ADOPTION), No. 4, 17 M.L.J. 186.

(5) Meaning of "actionable claim" and "debt"—See Transfer of Property Act, No. 10, 17 M.L.J. 87.

(6) "Sufficient cause," meaning of—See LIMITATION ACT, No. 9, 34 C. 216=5 C.L.J.

(7) "Official signature"—Meaning of, in Reg. XVII of 1806—See REGULATION XVII OF 1806 (BENGAL), No. 5, A.W.N. (1906), 309=29 A. 445.

(8) Meaning of "you shall enjoy the said lands with right of gift, sale, etc."—See HINDU LAW (WIDOW), No. 11, 7 M.L.J. 248.

(9) "Adimayavana," meaning of—See RESCATA, No. 7, 30 M. 208.

(10) Meaning of the word "dharma"—See WILL, No. 4, 2 M.L.T. 198.

Construction.—(Concluded).———**5.**—(of Words).—(Concluded).

(11) Meaning of "deposit"—Whether implies deposit of specific property returnable in specie—See DEPOSIT, No. 1, 6 C.L.J. 535.

(12) "Samskara" includes marriage—Mayukha and Mitakshara—See HINDU LAW (JOINT FAMILY), No. 17, 9 Bom. L.R. 1366.

Constructive possession.

(1) Application of doctrine of, to wrong-doers—Occupation by wrong-doer of portion of land, effect of—See DIGWARI TENURE, No. 1, 5 C.L.J. 583.

Contemporaneous deeds.

(1) Sale and agreement to reconvey—Transaction whether mortgage—Intention—Mortgage by conditional sale—See MORTGAGE (GENERAL), No. 15, 11 C.W.N. 400.

Contempt.

(1) Attaching Court's power to commit for—See ATTACHMENT, No. 1, 17 M.L.J. 334.

Contentious suit.

(1) Meaning of—See TRANSFER OF PROPERTY ACT, No. 16, 11 C.W.N. 561; No. 17, 9 Bom. L.R. 530.

Contract.

(1) *Railway Company—Receipt of goods by one company for carriage over its own and another company's line—Liability in respect of overcharge made by delivering company—Bye-laws—Power of Railway Company to alter the principle of calculation of rates.*

Two wagon loads of chillies were received by the Station Master at Bezvada on the Nizam's Guaranteed State Railway for carriage to Agra station on the Great Indian Peninsula Railway at a rate of Rs. 270 per wagon for the whole distance. On arrival at Agra, the Great Indian Peninsula Railway Company's Station Master demanded payment of higher rates, calculated per maund, and refused delivery until such rates were paid. The consignees paid under protest and sued both Railway Companies for a refund of the excess charges.

Held, that the contract for carriage of the goods for the whole distance was one entire contract with the receiving company, who were liable for the overcharge, if any, wrongfully demanded from the consignees (a).

Held, also that a bye-law of the Great Indian Peninsula Railway Company, which reserved to the Railway the right of re-measurement,

Contract.—(Continued).

reweighment, recalculation and reclassification of rates, terminals and other charges at the place of destination, and of collecting, before the goods are delivered, any amount that may have been omitted or under-charged, did not authorize the Great Indian Peninsula Railway Company to alter the contract between the parties and charge, at the place of destination, maund rates instead of wagon rates. **Chuni Lal v. The Nizam's Guaranteed State Railway Company, Ltd.**, A.W.N. (1907), 21 = 29 A. 228 = 4 A.L.J. 8 = 2 M.L.T. 42.

STANLEY, C.J.

Reference :—(a) 3 M. 240, *F*.

(2) *Sale of goods by sample—Bulk not equal to sample—Remedy of purchaser.*

If goods delivered do not answer to the contract, the buyer may return them; but he is not bound to do so; it is quite sufficient for him if he gives clear notice that the goods are not accepted and remain at the risk of the seller. But if he exercise any act of dominion over them, he is taken to have accepted them under the contract, subject to any breach of warranty. **Sumer Chand v. Ardishir**, A.W.N. (1907), 67 = 4 A.L.J. 245.

STANLEY, C.J., and BURKITT, J.

References :—4 B. and A. 387; 23 R. R. 313, L.R. 10 C.P. 391, (1893) 1 Q.B.D. 193, *R*.

(3) *Assignment of—Benefit of a contract can be assigned.*

The benefit of a contract, that is, the beneficial right or interest of a party under the contract, and the right to sue to recover the benefits created thereby, are assignable, provided that,

(a) the benefit is not coupled with any liability or obligation that the assignor is bound to discharge, and,

(b) the contract has not been induced by personal qualifications or considerations as regards the parties to it (a). **Nathu Gangaram v. Hanaraj Morarji**, 9 Bom. L.R. 114.

RUSSELL, J.

References :—(a) 33 C. 702, *F*. 1 M. H. C. 150, 4 M. 76, 16 B. 441, *R*.

(2) *Goods supplied on order of a person entitled to portion of an estate—Estate, whether bound.*

Where, after the death of the owner of an estate, a person who claimed the whole estate,

Contract.—(Concluded).

but who, according to a decree of the High Court, was held to be entitled only to a portion of it, incurred charges necessary for the maintenance of the estate, while he was managing it, held that such expenses were binding upon the estate. **Narayanaswami Naidu v. Rangam**, 17 M.L.J. 484.

SUBRAHMANYA IYER, O.C.J., and MILLER, J.

References :—3 M. 145 and 9 M. 80, *R*.

(5)—*Prima facie* irrevocable—Assertion of revocability—Burden of proof—Novation—Right to revert to original agreement—See COMMUTATION, No. 1, 6 C.L.J. 727.

(6) Assignment of—Chose in action—See STAMP ACT, No. 1, 9 Bom. L. R. 119.

(7)—by guardian—Specific performance—Personal liability—See GUARDIAN AND MINOR, No. 3, 11 C.W.N. 207.

(8)—to sell by guardian with Court's permission—Subsequent sale for higher price with permission—Whether specific performance of first contract is enforceable—See GUARDIAN AND MINOR, No. 4, 4 A.L.J. 24.

(9)—forbidden by law, person deliberately entering into—Remedy after contract has been executed—See ACT XXII OF 1886 (ODDH RENT) No. 3, 10 O.C. 243.

(10) Suit by stranger for performance of—Maintainability of suit—See ACT XI OF 1898 (CENTRAL PROVINCES TENANCY) No. 3, 3 N.L. R. 111.

(11) Omission of material term in written—Onus—Time being essence of—See SPECIFIC PERFORMANCE, No. 1, 11 C.W.N. 946 (P.C.).

Contract Act.

(1) Debtor wrongfully withholding payment after demand of payment by creditor—Interest—See HINDU LAW (DEBTS), No. 2, 9 Bom. L. R. 439.

(2) *Ss. 2, 10, and 11—Minor's contract—Right of Buddhist female minor to sue for compensation for breach of promise of marriage—Marriage according to Buddhist Law—Doctrine of estoppel.*

Under the Contract Act, a minor cannot make a contract. An agreement made by a minor is not merely voidable, but absolutely void; no effect can be given to such an agreement at the instance of either party, and a minor cannot take advantage of it, even though it be for his benefit (a).

Contract Act.—(Continued).

But, according to Buddhist Law, a Buddhist female minor can sue for compensation, independently of the Contract Act, under certain circumstances, for a breach of promise of marriage made to her (b).

Marriage, according to the Buddhist Law, is not wholly a matter of contract (c).

For an estoppel, there must be a representation, which induces another to alter his previous position. The general law of the land is, in no way altered by the law of estoppel. It is not allowed to enlarge the status or capacity of parties (d). **Kan Gaung v. Mi Hla Chok**, U.B. R. (1907), Contract, 5.

SHAW, J.C.

References :—(a) 30 I. A. 114 (**P. C.**), *F*; (b) S. J.L.B. 114, 235, 533, U.B.R. (1892—96), 200, U.B.R. (1897—1901), 499, *R.* (c) S.J.L.B. 235, *R*; (d.) 30 I. A. 114 (**P.C.**), 5 C. 669, *R*.

(2-a) S. 10—See No. 2, *supra*.

(3) S. 11—*Effect of document executed by lunatic.*

A document executed by a lunatic is void under S. 11. **Machaima v. Usman Beari**, 17 M.L.J. 78.

BENSON and WALLIS, JJ.

Reference :—30 C. 539 (**P.C.**), *Appl.*

(3-a) S. 11—See No. 2, *supra*.

(4) S. 16—*Fiduciary relationship of father and adopted son in cases of gift by son to father—Burden of proof of undue influence—Delay and acquiescence, effect of—Limitation Act, Art. 91.*

The equitable doctrine of undue influence applies to cases, in which the position of the donor to the donee has been such that it has been the duty of the donee (e.g., father) to advise the donor (son), or even to manage his property for him. In such cases, the Court throws upon the donee the burden of proving that he has not abused his position, and of proving that the gift made to him has not been brought about by any undue influence on his part. It is necessary to show that the donor had independent advice, and was removed from the influence of the donee, when the gift to him was made. In such cases, the question is not whether the donor knew what he was doing or proposed to do, but how the intention was produced, and whether all that care and providence was placed round him, as against those who advised him, which, from their situation and

Contract Act.—(Continued).

relation with respect to him, they were bound to exert on his behalf (a).

Delay and acquiescence would not bar the donor's right to equitable relief, unless he knew that he had the right, or, being a free agent at the time, deliberately determined not to enquire what his rights were, or to act upon them. Acquiescence, such as would bar a claim to relief, which would otherwise be good, is a question of fact (b).

It makes no difference that the claim under the deed of gift is made, in such a case, not by the donee, but by a third party; for, whoever receives the gift must take it tainted and infected with the undue influence and imposition of the person procuring the gift.

It does not follow that, because a party's remedy, as plaintiff, to have an instrument avoided on the ground of undue influence, is time-barred, his right to say, by way of equitable defence, if sued, that the instrument ought not to be enforced, is equally time-barred. Delay is, of course, an equitable reply to the equitable defence, but it cannot amount to a statutory bar. Art. 91, Limitation Act, does not apply to such a case (c). **Lakshmi Dass v. Roop Lul**, 17 M.L.J. 19—2 M.L.T. 4=30 M. 169 (**F.B.**).

WHITE, C.J., and BENSON and MILLER, JJ.

References :—36 Ch. D. p. 145 (181), 14 Vesey 299, *R*; (b) 8 De. G.M. and G. 133, *R.* (c) 12 B. 501, 28 B. 639, *R.*

(5) S. 16—*Undue influence—Unconscionable bargains—Contract voidable.*

To render a contract voidable on the ground of undue influence, there must be evidence of undue influence as required by S. 16 of the Indian Contract Act. A high rate of interest, which would induce a Court of equity to give relief against a bargain, as being on that account hard and unconscionable, is not by itself sufficient evidence of undue influence. There must be additional circumstances. When there is evidence of such additional circumstances, they should be considered in the light of justice and equity. Where the parties to the transaction are not on an equal footing, when it appears that the borrower was not aware of the real nature of the bargain, so that, he put his signature to a document, which in fact imposed very different terms to those appearing on the face of it, where the actual rate of interest is many times higher than what

Contract Act.—(Continued).

appears on the document, where the borrower, when pressed for payment for what appears due on such a document, has to renew on still more exorbitant terms,—all these are additional circumstances sufficient to make out a *prima facie* case of undue influence, so as to throw the onus on the lender to disprove it. **Chatring Moolchand v. Lieut. R. H. Whitechurch**, 9 Bom. L.R. 1296.

MACELOD, J.

- (6) S. 16, cl. 1—*Undue influence—Loan borrowed by a person in urgent need of money—Lender imposing terms on the loan—Promise to pay time-barred debt with interest—Unconscionable bargains—Fraud—Coercion.*

Under S. 16, cl. 1 of the Indian Contract Act, 1872, where two persons enter into a contract, first there must be subsisting between them some relation of the kind described in the clause; and, secondly, the dominating position arising out of that relation must have been used by the party holding that position to secure an unfair advantage over the other party.

When a man, who is in urgent need of money on account of his poverty and pecuniary difficulties, asks for a loan from another, that other is in one sense in a position to dominate the will of the former by proposing his own terms and getting the borrower to agree to them. The borrower's necessity is in such cases the measure of the terms agreed to. That is a feature of every contract of money lending, where the borrower is a man without credit and the lender is exposing his money to considerable risk. But that is not the vague kind of relation and domination contemplated by the plain terms of cl. 1 of S. 16 of the Indian Contract Act, 1872.

There are well-known relations such as those of guardian and ward, father and son, patient and medical adviser, solicitor and client, trustee and *cestui que trust* and the like, which plainly fall within cl. 1 of S. 16 of the Indian Contract Act, 1872. Where no such specific relations exist and the parties are at arm's length, undue influence may be exerted but its existence must be proved by evidence; and in such cases, the nature of the benefit, or the age, capacity, or health, of the party on whom the undue influence is alleged to have been exerted are of great importance. In short, the test is, confidence reposed by one party and betrayed by the other, which means there must be an element of fraud or coercion, under either of

Contract Act.—(Continued).

which the acts constituting undue influence must range themselves.

The term "unfair advantage" in cl. 1 of S. 16 of the Indian Contract Act, 1872, is used as meaning an advantage obtained by *unrighteous* means.

A promise to pay a time-barred debt is valid. The same principle applies to a promise to pay such a debt with interest.

A Court of equity will not set aside a contract merely because it flows from moral, not legal, obligations, unless it is proved that the defendant was forced, tricked or misled into it by the plaintiff by means of fraud, using that word not merely in the restricted sense of actual deceit but in the larger sense of an unconscientious use of power arising out of certain circumstances and conditions and showing that the defendant being victimised by the plaintiff's unfair and improper conduct was unable to understand what he was doing. **Ganesh Narayan v. Vishnu Ramchandra**, 9 Bom. L.R. 1164.

CHANDAVARKAR and KNIGHT, JJ.

- (7) Ss. 16 and 19A—*Undue influence—contract avoidable Debtor agreeing to pay exorbitant amount of interest—Court's power to relieve the debtor—Civil Procedure Code (Act XIV of 1882), S. 310—Money-decree—High Court decree can be made payable by instalment.*

The plaintiffs filed a suit on two promissory notes, the one carrying interest at 75 per cent. per annum, and the other at 60 per cent. per annum. It appeared that, when the defendant passed the promissory-notes in question, the plaintiffs were in a position to dominate his will.

Held, (1) that, reading Ss. 16 and 19A of the Indian Contract Act, 1872, together, the Court had the power to interfere and relieve a defendant, against what might appear to the Court unconscionable transactions.

(2) that the plaintiff should, under the circumstances of the case, be allowed to claim interest at 24 per cent. per annum.

Under S. 210 of the Civil Procedure Code, the High Court has the power to make its money-decrees payable by instalment. **Pema Dongra v. William Gillespie**, 9 Bom. L.R. 148=31 B. 348.

DAVAR, J.

Contract Act.—(Continued).

Reference :—1 C. 108, R.

- (8) Ss. 16 and 74—*Transfer of Property Act (IV of 1882)*, Ss. 86 and 88—*Mortgage-decree—Direction as to interest—Court not bound to allow mortgage rate up to realisation—Court rate from date fixed for redemption—Transfer of Property Act, S. 104, Rules of High Court under—C.P. Code, S. 209—Penalty, rate of interest when amounts to—Compound interest—Interest at increased rate from date of bond—From date of default—Undue influence—Borrower in urgent need—Mortgagee retaining sums out of the consideration money as commission—Effect.*

Urgent need of money on the part of the borrower does not, of itself, place the lender in a position to exercise undue influence on the borrower (a).

Where, out of the consideration money of a mortgage-bond, the mortgagor agreed to the mortgagee's retaining certain sums as commission.

Held, that the mortgagor could not, years after the execution of the mortgage, be allowed to turn round and say that he had not received full consideration.

When a stipulation for increased interest is retrospective, i.e., the increased interest runs from the date of the bond and not merely from the date of default, it is always to be considered a penalty, because an additional money payment in that case becomes immediately payable by the mortgagor.

S. 74 of the Contract Act does not prescribe that increased interest running from the date of default must be disallowed altogether, if found to be a penalty. It directs that the party complaining of the breach shall receive from the party, who has broken the contract, reasonable compensation, not exceeding the amount of the penalty stipulated for.

Compound interest is in itself perfectly legal, but compound interest at a rate exceeding the rate of interest on the principal moneys, being in excess of and outside the ordinary and usual stipulation, may well be regarded as in the nature of a penalty.

The Judicial Committee did not intend to lay down in *Rameswar Koer v. Syed Nawab Mehdi Hossein Khan* (b) that, in making a mortgage decree, the Court should allow interest at the mortgage rate up to the date of the actual realisation of the decretal money.

Contract Act.—(Continued).

The scheme and intention of the Transfer of Property Act shows that a general account of the mortgagee's dues should be taken once for all, and the aggregate amount stated in the decree for principal, interest and costs due on a fixed day, and that, after the expiration of that day, if the property should not be redeemed, the matter should pass from the domain of contract to that of judgment and the rights of the mortgagee should thereupon depend, not on the contents of his bond, but on the directions in the decree.

Held, that the High Court was right in allowing interest at the Court rate from the day fixed for the redemption (c). **Rani Sundar Koer v. Rai Sham Krishen**, 11 C.W.N. 249 (P.C.)=5 C.L.J. 106=4 A.L.J. 109=17 M.L.J. 43=2 M.L.T. 75=34 C. 150=9 Bom. L.R. 304.

LORD DAVEY, LORD ROBERTSON, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

References :—(a) 33 I.A. 118, *Expl.* (b) 2 C.W.N. 633=25 I.A. 179=26 C. 39, R. (c) 5 C.W.N. 137=28 I.A. 35, F'; 24 C. 766 and 21 M. 364, R.

(8-a) S. 19A.—See No. 7, *supra*.

(9) Ss. 20 and 65—Refund of consideration when vendor and purchaser are under mistake as to nature of property sold—See *SALE*, No. 1, U.B.R. (1907), Evidence, 1.

(10) S. 21—Mistake of law—Widow acquiring occupancy right—Effect of re-marriage—See ACT II OF 1901 (AGRA TENANCY), No. 3, 4 A.L.J. 475.

(11) S. 23—*Decree—Agreement for the satisfaction of the judgment-debt in excess—Sanction of the Court under S. 257A, C.P.C.—Agreement is void if made without sanction—The decretal debt included with other debts in a mortgage-deed—Deed void only to the extent of the decretal debt.*

The plaintiff owed the defendant a judgment-debt of Rs. 442-9-0 not bearing interest, which with other debts was incorporated in a mortgage, the total mortgage debt being Rs. 2,500, the whole of which bore interest. Sanction of the Court, prescribed by S. 257A of the Code, was not obtained to this arrangement.

Held, by Russell, C.J., that the bond contained several and distinct promises made for one and the same lawful consideration, and if the law will not enforce the promise as to the

Contract Act.—(Continued).

decretal amount and interest thereon, still it can and will enforce the promises for payment of the other sums therein mentioned.

Held, by Heaton, J., that the whole mortgage was not void; but the decretal amount should be omitted from the principal of the mortgage debt. The agreement in question was not "unlawful" within the meaning of S. 23 of the Contract Act, 1872. **Bhagabai v. Narayan Gopal**, 9 Bom. L.R. 950=31 B. 552.

RUSSELL, A.C.J., and HEATON, J.

(12) S. 23—Mortgagors entitled only to a share of the mortgaged property—Whether contract illegal—See TRANSFER OF PROPERTY ACT, No. 48, 12 C.W.N. 94.

(13) S. 23—Mortgage of occupancy holding, validity of—See ACT II OF 1901 (N.W.P. TENANCY), No. 2, A.W.N. (1907), 76.

(14) S. 23—Validity of stipulation for, and acceptance of, back fee—See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), No. 1, 45 P.W.R. 1907.

(15) S. 23, Illn. (f)—Office brokerage agreement—Consideration for affording facilities to secure permanent appointment—Rights of endorsee of pro-note with notice of unlawfulness of consideration.

A promise to pay money, in order to procure resignation, with a view to the promisor securing the appointment, is an office brokerage agreement unlawful as shown by illn. (f) to S. 23, and invalid as opposed to public policy. Where the pro-note containing such a promise itself evidences notice to the endorsee of the character of the transaction, the endorsee cannot succeed in a suit on the note. **Saminatha Aiyar v. Muthuswamy Pillai**, 17 M.L.J. 252.

SUBRAHMANIA AIYAR, J.

References:—1 H. B. 1 322, 2 R.R. 773, R.

(16) Ss. 23 and 43—Mortgage by a disqualified proprietor—Consideration forbidden by law—Void—Suit after cessation of disqualification—Not maintainable—See ACT XVI OF 1882 (JHANSI ENCUMBERED ESTATES), No. 1, 4 A.L.J. 636.

(17) S. 25, Expln. 1—Application to gifts—See GIFT, No. 1, U.B.R. (1907), Buddhist Law, Gift, 1.

(17-a) S. 25—Contract to pay debt barred by limitation—See LIMITATION ACT, No. 23, 132 P.R. 1907.

(18) S. 30—Badni transaction—Meaning of Badni Contract—Principal and agent—

Contract Act.—(Continued).

Right of agent to recover payment actually made by him—Onus—Proof of agency.

Held, that money paid on wagering or *Badni* Contracts are not recoverable, and, that an agent, before he can recover from his principal the amount claimed for losses in wagering contracts, entered into under the principal's instructions, must prove either actual payment on his principal's behalf, or that a liability has been occurred which is enforceable by law, and that a surrender of claim to profits made under a *Badni* Contract does not constitute an actual payment.

Held also, that an agent is entitled to recover actual expenses, which he has incurred out of his own pocket, under the direct instructions of his principal, and on his behalf, but the onus of proving this lies heavily on him (the agent).

Held, further, that, in the present case, the plaintiff failed to prove that he was acting as an agent, and that the allegation of agency was made for obvious reasons as is generally done in the *Badni* Contracts to evade the consequences of S. 30 of the Indian Contract Act, IX of 1872 (a). **Kashmiri Mall v. Girdhari Lal**, 57 P.W.R. 1907.

ROBERTSON and SHAH DIN, JJ.

Reference:—(a) 80 P.R. 1895, R.

(19) S. 30—Wagering contracts—Elements determining the nature of such contracts.

What the Court has to do, when it has to decide questions as to whether the transactions in a suit are genuine mercantile transactions or mere agreements by way of wagers, is, not simply to look at the transactions as they appear on the face of them, but to go behind and beyond them, and ascertain the true nature of dealings between the parties, by probing into surrounding circumstances and minutely examining the position of the parties and the general character of the business carried on by them. The Court must be careful not to be misled by the mere rectitude of the documents evidencing the transaction or the mere protestation of the one of the parties as to his real intention. The Court must for itself find out what were the primary intentions of the parties when they entered into the transactions in question before it. The attitude generally adopted by the party to the transactions, who, on the due date, stands to make a profit, and his protestation that he is or was always ready

Contract Act.—(Continued).

to give or take delivery, or that he always intended to do so, ought not to weigh with the Court, but the Court must, with the materials placed before it, endeavour to find out what both parties originally intended to do, when they first entered upon the business. If the Court is satisfied that, when the parties entered into the agreements before it, both of them intended neither to take or give delivery, but merely intended to adjust the transactions, on the due date or dates, by the payment or receipt of differences, as the case may be, at the prices of the commodities ruling at the market, at such due date or dates, then, the Court should have no hesitation in holding that the transactions were mere agreements by way of wagers, and, as such, void in law^(a). **Hurmukhrai Amoluckchand v. Narotamdass Gordhandass**, 9 Bom. L. R. 125.

DAVAR J.

References :—(a) 16 B. 441, commented on ; 7 Bom. L.R. 611=30 B. 205, 14 B. 320, 2 Bom. L.R. 450, 24 B. 227=1 Bom. L.R. 786, 28 B. 616=6 Bom. L.R. 521, 30 B. 83=7 Bom. L. R. 381, R.

(19-a) S. 43—See No. 16, *supra*.

(20) Ss. 44 and 45—*Suit to recover debt due to a partnership—Contract with one partner only, whether such partner could sue by himself under.*

This was a suit under a contract entered into with the plaintiff, who was one of the partners of a firm. A preliminary objection was urged that the plaintiff, who admittedly had a partner with him, could not sue alone, without joining such partner as co-plaintiff. *Held*, that as, in the present case, the bond sued on was executed by the defendants in favour of the present plaintiff alone, it was competent for him to maintain the suit by himself, without making his partner a co-plaintiff. **Mehr Singh v. Chela Ram**, 127 P.R. 1906=10 P.W.R. 1907=58 P. L.R. 1907.

CHATTERJI and ROBERTSON, JJ.

References :—7 B. 217, 20 B. 435, 17 B. 413, and 29, 7 C. 739, 18 M.33, 62 P.R. 1873, 156 P.R. 1889 and 86 P.R. 1891, R.

(20-a) S. 45—See No. 20, *supra*.

(21) Ss. 46 and 49—*Pakka adat agency—Place of performance of a contract by a pakka adatia—Cause of action—Jurisdiction.*

The Indian Contract Act makes no provision for the place of performance when no time or

Contract Act.—(Continued).

place is fixed and where there is no provision to perform without application.

If a debtor is bound to perform a contract out of the jurisdiction of a Court if required, the contract cannot be said to be one, which, according to its terms, ought to be performed within the jurisdiction.

The liability of a *pakka adatia* cannot be classed with that of an ordinary buyer and seller, bound to find out his creditor at his place of business. He undertakes to find out a customer, himself or another, at current prices for his constituent, and guarantees payment to the constituent of the profits if any. He undertakes to send such profits, not as debt due from himself, but as proceeds realized by him on the constituent's behalf, at the constituent's charges, and he is entitled to such charges as an agent for expenses properly incurred by him in conducting such business. He is to do certain set of service which can be performed consistently with the terms of his undertaking at his own place of business. In the absence of express or implied promise for performance elsewhere, the undertaking only gives rise to a cause of action in the Court within whose jurisdiction he resides (a).

The nature of relation between a *pakka adatia* and his constituent discussed. **Kedarmal Bhuramal v. Surajmal Govindram**, 9 Bom. L.R. 903.

BATTY, J.

References :—(a) 1 Q.B. 103, F. (b) 6 Bom L.R. 1038, not F. and commented on.

(21-a) S. 49—See No. 21, *supra*.

(22) S. 56—*Application of—Sale not completed—Return of deposit—Rescission of contract.*

S. 56 of the Contract Act provides for a case in which the performance of the contract becomes impossible otherwise than by some act of the promisor. The contract does not become void, if the promisor does something which renders the performance of the contract impossible.

Where the parties to a contract agreed to sell and purchase certain property, but did not get the sale completed in ten months after the agreement, and allowed the property to be auctioned, *held*, that the reasonable inference from their conduct was that the parties had

Contract Act.—(Continued).

rescinded the contract. **Ganga Dei v. Asa Ram**, 4 A.L.J. 778.

BANERJI, J.

(23) S. 56—Refusal of a younger brother to join the elder in executing a deed does not make performance of the agreement, by the elder, impossible—See CIV. PRO. CODE, No. 216, 17 M.L.J. 37.

(24) S. 59—Nature of appropriation—See ACT VIII OF 1885 (BENGAL TENANCY), No. 16, 11 C.W.N. 939.

(24-a) S. 65—See No. 9, *supra*.

(25) S. 67—*Fee of Legal Practitioner—Claim for its refund on the ground of his not appearing in the case—Justification.*

Held, that where a legal practitioner is ready and willing to conduct in Court the legal business of his client but is prevented from doing so, by an act or omission of his client (*e.g.*, compromising the case and refusing to pay Court-fee required for the Power-of-Attorney), the latter is not entitled to claim refund of the fee from the former on account of his not appearing in the case. **Jaggan Nath v. Mahtab Singh**, 22 P.W.R. 1907=42 P.L.R. 1907.

RATTIGAN, J.

(26) S. 68—Suit for money advanced to minor—Registration of bond executed by guardian—Necessaries supplied to minor—See LIMITATION ACT, No. 66, 10 O.C. 38.

(27) S. 69—*Government as tenant paying assessment for landlord—Applicability of the section.*

S. 69 of the Act applies, where one person pays money which another is bound to pay. Payment in law means payment to another person. Government sued to recover, from a mulgar or landholder whom it held certain lands, assessment paid as tenant to prevent the land from being sold for arrears of revenue. *Held* that no suit would lie under S. 69, inasmuch as the Government had not paid the sum to any one, but had retained it all along, merely transferring it from one pocket to another, and inasmuch as the sale for arrears of revenue could only take place under the orders of the Government. **Secretary of State v. Fernandez**, 17 M.L.J. 337=2 M.L.T. 320=30 M. 375.

BODDAM and WALLIS, JJ.

References :—3 B. 154 and 4 B. 473, R.

Contract Act.—(Continued).

(28) S. 69—*Land registered in plaintiff's name, but belonging to and in possession of the defendant—Voluntary payment of kist by plaintiff—Suit to recover kist amount—Revenue Recovery Act (II of 1864, Madras).*

Where land is assessed for revenue, the owner thereof cannot, by virtue of his ownership alone, be held as compellable to pay the revenue. The right of the Government to proceed for the recovery of revenue is regulated by the Revenue Recovery Act. The property of the land-holder, *i. e.*, the registered holder, as well as the land, on which the arrear is due, may be seized and sold, and such holder may also be arrested and confined. But, as against an owner of land, who is not a registered holder, the same remedies are not available and neither his property, other than the land in regard to which the arrear has accrued, nor his person, can be proceeded against. No doubt, if the land liable for the revenue is sold in due course of legal process, the unregistered owner's right to the land would be lost. But, that shows nothing more than that it would be to his interest to pay up the arrear of revenue. Consequently, such arrears cannot be said to be what the owner is bound by law to pay, within the meaning of S. 69 of the Contract Act.

Where, therefore, the plaintiff sued to recover from the defendant the amount voluntarily paid by him on account of the revenue due in respect of certain land which stood registered in his name, but which belonged to the defendant and was in the latter's possession when the money was paid, *held* that the claim was unsustainable, under S. 69 of the Contract Act, as the demand for the revenue was one which the defendant was not bound to meet. **Boja Sellappa Reddy v. Yridhachalla Reddy**, 1 M.L.T. 323=16 M.L.J. 569=30 M. 35.

SUBRAHMANYA AYYAR, J.

(29) S. 69—*Rent paid by mortgagee for purchaser of mortgaged property—Plea of benamie by purchaser.*

Where a person, on the strength of his purchase of a share of a putni taluq from the mortgagor, got his name registered in the landlord's book, in place of his vendor (mortgagor) and has, in various transactions, given himself out as the purchaser, the mortgagee of such share, who paid up the putni rent, in order to save his interest therein, can recover the amount so paid

Contract Act.—(Continued).

from the purchaser, as the purchaser was *prima facie* bound in law to pay the rent, and the latter cannot plead that he was only a benami-dar for the mortgagor. **Umesh Chandra Banerjee v. Khulna Loan Company**, 34 C. 92.

GHOSE and CASPERSZ, JJ.

- (30) *S. 69—Auction sale subject to charge for maintenance—Payment of charge by purchaser—Purchaser's right to recover such amount from judgment-debtor—Transfer of Property Act, S. 55 (5) (d), applicability of principle of, to Court sales.*

An execution-purchaser, who purchases certain property subject to a charge for maintenance, has no cause of action against the judgment-debtor, when the charge is enforced against the property and the purchaser pays to avoid a sale. In private sales, the buyer is bound under S. 55 (5) (d), Transfer of Property Act, to pay the principal and interest on incumbrances subject to which the property is sold, and the same principles must apply to Court-sales. **Mangalathammal v. Narayanasawmy Aiyar**, 17 M.L.J. 250=30 M. 461.

BENSON and WALLIS, JJ.

- (31) *S. 69—Money paid for another—Suit for money had and received—Refund of money paid by mistake—Purchaser of putni tenure sold for arrears of rent—Payment of rent after purchase—Acceptance by land-lord—Sale set aside at the instance of defaulters—Irrregularities on the part of the land-lords in bringing the putni to sale.*

Where a putni tenure is sold for arrears of rent and purchased by the plaintiff, and rents are paid by the plaintiff to the Zemindars and accepted by them, and the putni sale is afterwards set aside at the instance of the defaulting putnidars on the ground of irregularities committed by the Zemindars, the plaintiff is entitled to receive back the money paid by him as rent from the Zemindars to whom he paid it and who are not entitled to retain it.

Per RAMPINI, J.—The Zemindars are, in the circumstances, themselves to blame for the sale being set aside, and whether the plaintiff has a remedy against the defaulting putnidars or not, he is certainly entitled to one against the Zemindars.

The plaintiff, when he made the payments, made them for himself, and not for the defaulting putnidars, and he cannot be regarded as a person interested in the payment of money

Contract Act.—(Continued).

for another, within the meaning of S. 69 of the Contract Act, and it is doubtful if he is entitled to recover the money from the defaulters (a).

Per WOODROFFE, J.—The question whether the plaintiff is entitled to relief as against the defaulting putnidars, does not arise and need not be enquired into, as the plaintiff does not ask for a decree against them.

If the plaintiff paid his money under a mistake of fact to the Zemindars, he is entitled to recover it from them in a suit, which, according to the old forms of action, would have been for money received.

The effect of the subsequent reversal of the putni sale must be, taken to be, that, when the payments were made, they were so made under mistake, though the circumstances, which made the payment one by mistake, did not take place until afterwards. **Nagendra Nath Pal Chowdhury v. Chundra Sekhar Delal**, 5 C.L.J. 59.

• RAMPINI and WOODROFFE, JJ.

References:—(a) 25 C. 305 and 21 C. 142, D.

- (32) *S. 69—See MORTGAGE (GENERAL), No. 16, 11 C.W.N. 403.*

(33) *Ss. 69, and 75—Suit on bond to recover money of which a third party had the benefit—See LIMITATION ACT, No. 68, A.W.N. (1907), 214.*

- (34) *S. 70—Inamdar holding land rent-free—Zemindar paying the water-rate—Liability of the Inamdar for the water-rate.*

An Inamdar holding land rent-free is not entitled to take water from a Government source, for the use of his land and leave the Zemindar to bear the water-rate, which, in consequence of his action, becomes payable under Act VII of 1865 (Madras).

Under S. 1 of Act VII of 1865, such water-rate is only to be levied on the land, under S. 2, arrears are to be realised in the same manner as arrears of land revenue, that is to say, from the landholder under Act II of 1864 (Madras).

The Zemindar himself deriving no benefit from the water, the Inamdar, who has enjoyed the benefit of the water, is bound under S. 70 of the Contract Act, to compensate the Zemindar by refunding the water-rate, which the Zemindar has been obliged to pay. **Rajah of Yenkatagiri v. Sulbarayudu**, 17 M.L.J. 145=39 M. 277.

BENSON and WALLIS, JJ.

Contract Act.—(Continued).

(34-a) S. 70—See No. 33, *supra*.

(34-b) S. 72—Voluntary payment—Civ. Pro. Code (Act XIV of 1882), S. 310 A—Property of third person sold in execution—His remedy—Right to recover money erroneously deposited under S. 310 A.

When property belonging to A was sold in execution of a decree against B, and A had the sale set aside by making a deposit under S. 310 A of the Civ. Pro. Code,

Held that A has no right to sue the decree-holder for recovery of the amount of the deposit money paid to him. (a)

A was not bound to apply under S. 310 A, Civ. Pro. Code, to set aside the sale, nor had he right to do so. **Kunja Behari Singha v. Bhupendra Kumar Dutt**, 12 C.W.N. 151.

WOODROFFE and COXE, JJ.

References :—(a) 15 C. 656, 7 C. 648, R.

(35) S. 73—Contract for tolls entered into with Local Fund Board—Implied breach of contract to keep road fit for traffic—Damages, measure of—Local Boards Act, 1884, S. 150—Limitation.

Plaintiff contracted for some tolls on a certain road under the Local Fund Board for one year. During the year, he complained to the President of the Board that the road was in such a state of disrepair as to prevent traffic, and that he, in consequence, was sustaining loss, and applied for a remission. The President did not make any award in respect of this claim for compensation. Subsequently, the road, in order to enable thorough repairs to be effected, was completely closed to traffic under the orders of the President and without the consent of the contractor. *Held* that this was a breach of the implied term of the contract to keep the road open to traffic, and that the plaintiff was entitled to rescind the contract and claim damages from the Board. The measure of damages is the net amount, which the plaintiff would have received under the terms of the contract for the entire term, if he had been allowed to carry it out. The suit is not barred by limitation under S. 150 of the Local Boards Act, 1884, as the suit is not of the description provided for by paragraph 1 of that section, but one for a breach of contract (a). **The President, District Board, Malabar v. Kariyarath Puthisseri Kenti Kanaram**, 2 M.L.T. 194 = 17 M.L.J. 390.

SUBRAHMANIA AYYER and BENSON, JJ.

Contract Act.—(Continued).

Reference :—(a) 2 M. 124, 12.

(36) S. 73—Contract to sell immoveable property—Inability of vendor to make a good title—Damages for breach of contract—See DAMAGES, No. 1, 9 Bom. L.R. 1087. *

(37) S. 73—Refusal by tenant to take the house let—Damages—See LANDLORD and TENANT, No. 4, 137 P.R. 1906 = 1 P.W.R. 1907 = 5 P.L.R. 1907.

(38) S. 73—Suit for damages for breach of contract—Collateral and consequential damages—Remote and indirect damages, if recoverable—See DAMAGES, No. 2, 6 C.L.J. 398.

(39) S. 74—Agreement in this case not considered as a bail bond or recognisance—Necessity of proving actual damage under the section—See ACT V OF 1884 (LOCAL BOARDS MADRAS), No. 1, 17 M.L.J. 537.

(39-a) S. 74—See No. 8, *supra*.

(40) Ss. 77, 83, 95 and 178—Sale of unascertained goods—Appropriation, effect of—Non-payment for goods—Conversion of mate's receipts into bills of lading—Pledge of bills of lading—Conditional appropriation.

Where goods, which were agreed to be purchased were not ascertained at the time of the contract, but were subsequently appropriated by the sellers, for the purposes of the contract, and were put alongside the exporting vessel and shipped at the request of the buyers, who subsequently obtained bills of lading in exchange for the mate's receipts, the goods must be taken to have been ascertained, and, under the conjoint operation of Ss. 77 and 83, Contract Act, the sale must be taken to have been complete, involving the transfer of the ownership of the goods from the seller to the buyer. One of the terms of the contract provided :—"Terms of payment : Cash on delivery of mate's or dock receipts as provided in Cls. 8, 9 and 11. Should the said receipts or warrants be retained by the buyers for examination, they shall remain the property of the sellers and be held by the buyers in trust for and at the absolute disposal of the sellers, until payment has been made in cash in terms of this contract, and if payment be made by cheque, until such cheque has been cashed." *Held* that this clause did not reserve to the sellers the right of disposing of the goods, nor did it render the appropriation conditional on payment of the price. The property in the goods having passed to the buyers, they were

Contract Act.—(Continued).

entitled to sell the goods or pledge them and, therefore, the pledge by the buyers of the bills of lading to a Bank, who acted *bona fide* in the matter, and without any notice of the above mentioned contract between the buyers and the sellers, was a perfectly valid pledge, and did not fall within the proviso to S. 178 of the Act.

Per GEIDT, J.—The object of the above clause was to enable the sellers to enforce their lien, even though the property in the goods had passed to the buyers. **Juggernath Augurwallah v. E. A. Smith**, 34 C. 173.

MACLEAN, C.J., HARRINGTON and GEIDT, JJ.

(40-a) S. 83—See No. 40, *supra*.

(40-b) S. 95—See No. 40, *supra*.

(41) Ss. 140, 251—Surety for a partnership firm—Liability of assignees of a partner to reimburse payment made by surety—Partner's authority to make other partners liable on a contract—See **PARTNERSHIP**, No. 3, 107 P.R. 1907.

(42) *Chap. IX, S. 172—Pawn-broker, who is a—English and Indian Law.*

The mere taking of goods as security for money lent would not make the lender a pawn-broker. To show that a person comes within the definition of pawn-broker, it must be proved that he carries on the business of lending money on the security of goods pledged to him, and that he holds himself out to lend money on such security and is in the habit of doing so.

In India, the English Law on the subject of pawning and pawn-brokers is not applicable. But Ch. IX of the Contract Act is the law in force in India. According to the Indian Law, there can be a taking in pawn, even though no fixed time be agreed on for re-payment of the loan, on account of which goods are deposited as security. **King-Emperor v. Kanappa Chetty**, 4 L.B.R. 8=6 Cr. L.J. 118.

HARTNOLL, J.

(42-a) S. 178—See No. 40, *supra*.

(43) Ss. 198, 211 and 216—Secret profits by agent—when principal can ratify—See **PRINCIPAL AND AGENT**, No. 2, 4 A.L.J. 587.

(43-a) S. 211—See No. 43, *supra*.

(43-b) S. 216—See No. 43, *supra*.

(44) *S. 236—Principal and Agent—Undisclosed principal—Broker acting as principal without knowledge of other party, if can maintain action as principal.*

Contract Act.—(Concluded).

Plaintiff's suit to recover Rs. 2,500 in respect of breach of three contracts for the purchase and sale of jute. The Court found as a fact that, in the transaction in suit, the plaintiff, purported to act as broker to the defendant, but really acted as principal, and that this was without the knowledge and consent of the defendant.

Held that S. 236 of the Contract Act was a bar to plaintiff's action (a). **Sewdut Roy Maskara v. Mesrope Martyrosee Nahapiet**, 11 C.W.N. 609=34 C. 628.

HARRINGTON, J.

References:—(a) 2 Dow and C. 188, 192; 5 Bli N.S. 165; 30 P.R. 147 H.L. (1831); L.R. 7 H.L. 802=44 L.J.C.P. 302 (1874), *followed*.
(45) S. 251—See No. 41, *supra*.

Contract Act (Travancore).

(1) *Makkathayi Vellalas governed by Hindu Law—Bond in consideration of dissolution of marriage void—contrary to Hindu Law—Contract Act, Ss. 23 and 24—Judicial separation.*

Where a Makkathayi Vellala husband, governed by the Hindu Law, was sued on a bond executed by him for Rs. 400 to his first wife, in consideration of the parties being released from the bonds of matrimony contracted by them, as recited in an agreement executed by the wife on the same day, *held*,

that the bond was void, under S. 23 of the Contract Act, as it offended against the most cardinal principles of indissolubility which underlay the Hindu institution of marriage and that, if it was given both in consideration of the wife's agreement to be divorced and for her support, it was still void, under S. 24 of the Contract Act, as the portion of the amount intended, as consideration for the divorce could not be severed from what was intended for the wife's support;

that the validity of the marriage contracted by the parties was quite legal according to authority (a), and that the wife was governed by the same law of inheritance as her husband;

that if the parties contemplated a judicial separation alone, the bond would not be contrary to the Hindu Law; for when a wife was deserted for any cause, not affecting her caste or other validity of her marriage, the desertion consequently not being irrevocable in its nature, such desertion resembled what was called a judicial separation in other systems. **Yelu**

Contract Act. (Travancore)—(Concluded.)

Pillay v. Madapillay Umayamma, 22 T.L.R. 18.

PADMANABA AIYER and RAMACHANDRA ROW, JJ.

References :—(a) 9 T.L.R. 21, 16 T.L.R. 64, followed. 16 T.L.R. 71, referred to.

(2) *Ss. 18 and 19—Fraud and misrepresentation—Principal and agent—Lease—Renewal of lease by sub-lessee whether accrues to lessee—Darkhast rules.*

Fraud might be constituted either by an act or by an omission. But mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that it is the duty of the person keeping silence to speak.

It is not every kind of fraud and misrepresentation that would enable a party to a contract to rescind it. Misrepresentation alone is not a ground for rescission "if the party whose consent was caused" by it "had the means of discovering the truth with ordinary diligence." Similarly, fraudulent silence of one party cannot enable the other party to rescind the contract if the latter had constructive knowledge.

A principal must be presumed to be bound by the acts of his agents, clothed before the world by himself, with authority to do certain acts.

There is no rule of public policy which requires that a sub-lessee should not obtain renewals for his own benefit, provided his obligations under the sub-lease to his lessor are duly carried out.

Thus were the sub-lessees of the defendant, when their sub-lease term was about to expire, obtained from the original lessor a registered deed of lease direct for themselves, it was held that such lease did not accrue to the original lessees, but that the sub-lessees were entitled to enjoy the lands under the renewed lease.

The violation of even the Government Darkhast-rules will not invalidate the grant by the sirkar of lands on pattom (a). **Thomen Cheryathu v. Konthalukhan Musavikan**, 22 T.L.R. 64.

SADASIVA AIYER, C.J., and PADMANABHA AIYER, J.

References :—(a) 12 M. 404, 26 M. 268 & 26 M. 742, R.

(3) S. 19—See No. 2, *supra*.

Contribution.

(1) *Suit for—Co-sharers making default in paying Government revenue, whether joint tort-feasors—Co-sharers, duty of—Buying in the benami of others, whether tortious against other co-sharers.*

Co-sharers, who make default in paying Government revenue, commit no tort against other co-sharers. If they commit no wrong in defaulting and are permitted to buy at the subsequent revenue sale, they commit no tort in buying benami.

When a revenue sale is set aside by a Civil Court on account of irregularities, and one of the purchasers is saddled with the costs, he can maintain a suit for contribution against the other purchasers. **Lala Rambeyas Lal v. Sheoji Singh**, 5 C.L.J. 64.

HARINGTON and PRATT, JJ.

(2) *Suit for—for Arrears of rent, liability to pay severally and jointly—Joint promisors. Liability of, qua the superior proprietor—Cause of action for contribution on payment—Liability for co-sharer to contribute even if not sued by superior proprietor—Costs, right of contribution as to.*

The appellant and the respondent along with other persons were co-sharers in an underproprietary tenure. The superior proprietor sued the respondent and the other co-sharers for arrears, but did not implead the appellant. The suit was decreed; the respondent paid the whole decretal amount and now brought the present suit for contribution against the appellant for the share of rent due from her. The appellant contended that, as she was not a party to the former suit, she was not bound by the decree, and that she could not be held liable to the respondent, because, at the time when the respondent paid the sum decreed, she had no interest in the payment, inasmuch as at that time she had no interest in the holding, and the superior proprietor's claim for rent was barred by limitation as against her. The appellant also urged that she was not liable for any part of the costs incurred by the respondent in the former suit.

Held, that person, liable with others jointly and severally for rent, does not lose his right of contribution against the others, by failing to ask the Court to make them parties to the suit inasmuch as the liability to contribute does not depend upon the decree, but on the fact that he and the co-sharers were in the position of joint promisors *qua* the superior proprietor; and

Contribution.—(Continued).

where one of such promisors has to discharge the whole debt, or a part greater than his share, he is entitled to recover from each of the others a contribution or proportion of the excess beyond his own share (a).

Held, further, that, as the respondent could not have avoided payment of the whole rent, at the time when he was sued and when he had to pay it, a cause of action for contribution accrued on the payment.

Held, also, that there could be no right to contribution in respect of costs (b). **Musammatt Kaniz Fizza Bibi v. Sheo Narain Misr**, 10 O.C. 108.

CHAMIER, J.C.

References:—(a) 9 C.B. 493, *R*; (b) G. N.W.P. H.C.R. 192, *followed*.

(3) Suit for, —Set-off—Limitation.

Where in a suit for contribution by a co-sharer, for a certain sum of money, paid on behalf of his other co-sharers, to discharge a decree for rent obtained against them jointly, the latter (i.e., the defendants) claimed a set-off, on account of previous payments by them, of similar decrees, for the benefit of the plaintiff amongst others,

Held, that no question of limitation arose as regards the claim for set-off. The remedy might have been barred, but the right to the debt was not extinguished (a). **Gajadhar Mahto v. Raghubar Gope**, 12 C.W.N. 60.

BRETT and MOOKERJEE, JJ.

Reference:—(a) 6 C. 340, *R*.

(4) Suit for, by purchaser of equity of redemption—See TRANSFER OF PROPERTY ACT, No. 66, 3 N.L.R. 92.

(5) Suit for—whether of small cause nature—See ACT IX OF 1887 (PROVINCIAL) S.C. COURTS, No. 9, 30 M. 212.

(6) Joint decree for costs—Suit for—See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), No. 8, 4 A.L.J. 543.

(7) Sale of putni taluq for arrears of rent—Payment by mortgagee—Purchaser of mortgagor's interest benamtee—Suit against such purchaser—See CONTRACT ACT, No. 29, 34 C. 92.

(8)—by reason of purchase by decree-holder of some of the mortgaged properties, to be worked out in a separate suit and not in execution proceedings—See MORTGAGE (GENERAL), No. 10, 4 C.L.J. 573 = 34 C. 13.

Contribution.—(Concluded).

(9) Release of one judgment-debtor—Execution against others—See LIMITATION ACT, No. 144, 4 A.L.J. 405.

Converts.

(1) *Co-parcenership between persons converted from the Hindu religion.*

Parcenership can be a part of the law governing the rights of a Christian family converted from the Hindu religion. **Francis Ghosal v. Gabri Ghosal**, 8 Bom. L.R. 770 = 31 B. 25.

JENKINS, C.J., and BRAMAN, J.

References:—9 M.I.A. 195, 12 C. 706 and 23 B. 80, *R*.

Co-owners.

(1) *Adverse possession—Mahomedan co-owners of a house—One of them out of possession for 12 years—Co-owner in possession not recognising his title, effect of—Distinction from Hindu co-ownership.*

A clear distinction must be made between the case of non-possession, or non-receipt of rents and profits, by members of an undivided Hindu family, who are co-owners, and the non-possession or non-receipt of rents and profits, by a person, who was a co-sharer, but entitled to a specific share or interest in the property prior to dispossession or ouster from receipt of rents and profits. Where, therefore, one of the two co-owners of a house, who were Mahomedans, left the house, and the other co-owner remained in possession and did not recognize his title for over 12 years, *held* that the other co-owner or his representative could not recover possession of his share in the house (a). **Chiranjil Mal v. Nathia**, 4 A.L.J. 473 = A.W.N. (1907), 195.

RICHARDS, J.

References:—(a) 31 Q. 970; 3 C.W.N. 774; 2 A.L.J. 107, *D*; 28 A. 479, *resd. to*.

(2) *Some co-owner taking khas possession—Share of rent—Dispossession Damages.*

Where one co-owner takes exclusive possession of land which has been through a tenant in the possession of all the co-sharers and had been yielding profits in the shape of rent to all of them, such co-sharer must compensate his other co-sharers for the loss of their share of the rents. **Ram Sankar Bhaduri v. Jnanada Sundari Debye**, 5 C.L.J. 267.

MACHERSON and STEVENS, JJ.

References:—18 C. 10 = 17 I.A. 110, *Expl.*

Co-owner.—(Concluded).

(3) Position of, who has separated his share, but not by metes and bounds—See ACT VIII OF 1885 (BENGAL TENANCY), No. 23, 11 C.W.N. 1148.

(4) Possession of land by under the common title, presumed to be for benefit of all—When possession by, is adverse—See PARTITION, No. 6, 12 C.W.N. 127.

Co-sharers.

(1) *Expenses incurred in litigation—Liability of sharer not a party to suit.*

The co-heirs of a deceased Mahomedan were his mother and his two wives. The two wives executed a mortgage, which was upheld on the ground that the money secured by it was raised for the purpose of carrying on the defence of a testamentary suit, in which a will was propounded which purported to have been executed by the deceased. The mother was not a party to the proceedings.

Held, that the mother was not liable, either under an implied contract or on the ground of equity, to share the expenses of litigation though carried on *bona fide* in respect of the common property. **Halima Bee v. Rosham Bee**, 17 M.L.J. 439 = 2 M.L.T. 466.

SUBRAHMANIA AIYAR, OFFG. C.J., and MILLER, J.

References:—21 C. 142, R ; 21 C. 496, F,

(2) *Separate possession of distinct plots by arrangement—Sale by a co-sharer—Purchaser's right to exclusive possession.*

When, by private arrangement amongst co-sharers, one of them is in exclusive possession of a certain portion of the *ijmali* land, a purchaser of the right, title and interest of the latter, is entitled to be placed in the same position as his vendor.

An arrangement amongst co-sharers like the above continues to be a good and binding arrangement, until the co-sharers themselves agree to give it up and come to some other arrangement, or until any one of the co-sharers demand a partition of the entire joint lands, either in Court or out of Court. **Kumudini Mazumdar v. Rasik Lal Mazumdar**, 11 C.W.N. 517.

GHOSE and CASPERSE, JJ.

(3) *Suit for ejectment—Defence that defendant is a proprietor—Question of proprietary title—Proper remedy against him—See ACT II OF 1901 (AGRA TENANCY), No. 11, 4 A.L.J. 1.*

Co-sharers.—(Concluded).

(4) *Suit for profits by recorded co-sharer—Presumption—Burden of proof—See ACT II OF 1901 (AGRA TENANCY), No. 19, 4 A.L.J. 27.*

(5) *Making default in paying Government revenue, whether joint tort-fesors duty of—Buying in the Benamsee of others, whether tortious against other co-sharers—See CONTRIBUTION, No. 1, 5 C.L.J. 64.*

(6) *Sale to stranger with concurrence of—Purchase by such co-sharer—Maintainability of suit for pre-emption—See PRE-EMPTION, No. 8, 3 A.L.J. 794 = 29 A. 125.*

(7) *Meaning of—See PRE-EMPTION, No. 5, 10 O.C. 86.*

(8) *Test of Co-sharership—Whether land held by one liable to be sold in case of a sale for arrears of Government revenue—See PRE-EMPTION, No. 21, 10 O.C. 225.*

(9) *Test of being a,—Oudh Laws Act, S. 9, Cls. 2 and 3—See PRE-EMPTION, No. 20, 10 O. C. 257.*

Costs.

(1) *Civ. Pro. Code, Ss. 583 and 612—Application for leave to appeal to Privy Council—Costs—Execution.*

When a Division Bench of the High Court makes an order dismissing an application for leave to appeal to His Majesty in Council with costs, the order as to costs is to be enforced by execution in the lower Court, which passed the order originally. **Jogendra Chandra Sen v. Bibee Wazidunnessa Khatun**, 11 C.W.N. 856 = 34 C. 850.

MACLEAN, C.J., and HOLMWOOD, J.

(2) *Practice as to allowing costs of counsel—Costs of third counsel in a defended long cause—Party and party costs—Attorney and client costs—Practice governing the allowing of costs—Taxing Master's decision—Review by the Chamber Judge—High Court Rules and Forms, Rule 577.*

As a general rule, the Judge in Chambers will not interfere with issues of taxation which are entirely within the Taxing Master's discretion, or go into details of such discretionary items, but there is nothing to prevent him from doing so, if it appears to him, that the interests of justice require his interference; and it would be his duty in all such cases to review and revise taxation and judge and decide for himself what would be a just order to make under the circumstances.

Costs.—(Continued).

Where a party to a suit has already briefed two Counsel for hearing, and a third is instructed to make an application to transfer the case from one Judge to another, the costs shall be, in the absence of any order making the costs, costs in the case, disallowed between party and party, though they may be allowed between attorney and client.

A party to a defended long cause is entitled to appear by two Counsel. If both Counsel attend throughout the hearing and the other party is ordered to pay the costs of the suit, their brief fees and full refreshers would be allowed on taxation against the losing party. If the suit is conducted by one Counsel only throughout, the full refreshers of the conducting counsel and a nominal refresher of 2 G. Ms. of the other Counsel would be properly allowable against the opponent if ordered to pay costs. If the absent Counsel attends for portions of the time the case is at hearing, his refresher proportionate to the time he attends would also be properly allowable in addition to the full refresher allowed to the Counsel who attends and conducts the case.

When a party to a defended long cause engages two Counsel, he has a right to the services of at least one of them. He is under no obligation whatever to engage a third Counsel. If both Counsel find that they would, owing to other engagements, be unable to go in and conduct the case when it is called, it is obviously the duty of one of them to return the brief.

A party is at liberty at any time to employ a third Counsel, but this right of employing a Counsel must not be allowed to work hardship on the losing opponent.

If three Counsel are engaged before the hearing, it will be for the Taxing Master to consider the fees and refreshers of which two he will allow between party and party, and which Counsel-fees should go between attorney and client. A Solicitor engaging three Counsel is entitled, in the event of his recovering costs from the opponent, to have his third Counsel's costs taxed between attorney and client, if he proves express authority from his client, or if he proves that some peculiar contingency arose, which made it necessary for him to engage a third Counsel in order to safeguard his client's interest.

If a third Counsel is added after the hearing of the suit has commenced, such addition

Costs.—(Concluded).

must be at the cost of the party doing so. **Banoo Begum v. Mir Aun Ali**, 9 Bom. L.R. 988.

DAYAR, J.

(3)—as to pleader's fees—Power of Court as to costs—See PROBATE, No. 1, 6 C.L.J. 458.

(4) Taxation of—Practice—See HIGH COURT RULES (BOMBAY), No. 5, 9 Bom. L.R. 1014.

(5) No appeal lies to Privy Council when the two Courts differ only as to—See CIV. PRO. CODE, No. 299, 10 O.C. 65.

(6) Appeal dismissed or accepted "with costs," meaning of—See CONSTRUCTION (OF DECREE), No. 1, 18 P.R. 1907.

(7) —of partition suit, by whom to be borne—Lessee's liability for—Appeal on question of—See PARTITION, No. 4, 5 C.L.J. 642=34 C. 878.

(8) No right of contribution for—See CONTRIBUTION, No. 2, 10 O.C. 108.

(9) Order as to costs, whether "judgment" under S. 15 of the Madras Letters Patent—See LETTERS PATENT (MADRAS), No. O, 17 M.L.J. 569.

Counsel.

(1) Counsel's address, Notes taken, by the Judge of—Evidence—Practice.

The notes taken by the Judge of Counsel's address are good evidence that, when the Counsel was addressing the Judge, he did say what the Judge has noted. But if there is any real contention as to the correctness of the notes, it would be open to the other side to prove that they were not correct. **R. D. Sethna v. Mirza Mahomed Shirazi**, 9 Bom. L.R. 1042.

BEAMAN, J.

(2) Witnesses—Counsel giving evidence on behalf of their clients—Court—Practice.

The Court will not allow Counsel conducting cases to give evidence on behalf of their clients, in respect of matters with which they were acquainted before they were retained. **R. D. Sethna v. Mirza Mahomed Shirazi**, 9 Bom. L.R. 1044.

BEAMAN, J.

(3) Charge of professional misconduct—Evidence to prove the charge—See EVIDENCE ACT, No. 27, 9 Bom. L.R. 8.

(4) Omission of—to argue question of law or abandoning a point—power of Court to go into question—See PLEADING, No. 1, 11 C.W.N. 340.

Counsel.—(Concluded).

(5) Practice as to allowing costs of—See *COST*, No. 2, 9 Bom. L.R. 988.

(6) Counsel's fees—Originating summons—Taxation of costs—Practice—See *REGISTRATION ACT* (III of 1877), No. 5, 9 Bom. L.R. 1071.

Counterpart.

Where there is discrepancy between lease and its counterpart, presumption is that lease is correct—See *LEASE*, No. 4, 6 C.L.J. 572.

Court.

(1) *Court's process, abuse of—Wrong done by order of Court—Court's inherent power to rectify—Events happening after the filing of appeal.*

When an order has been improperly or fraudulently obtained from a Court, as soon as the Court is apprised of the fact, it will recall the order, on the ground that no Court will tolerate an abuse of its process. The Court has inherent power to do so (a).

When there has been a wrong done by an order of Court which has been set aside on appeal, the Court executing the decree without express authority of law is competent to put the parties in the position which they occupied before that order.

It is not only competent to a Court of appeal, but it may be its duty, under certain circumstances, to take notice of events which have happened since the order challenged in appeal was made. **Udit Chobey v. Rashika Prasad Upadhyaya**, 6 C.L.J. 662.

MOOKERJEE and CASPERSIRZ, JJ.

Reference :—(a) 6 C.W.N. 710, 11.

(2) *Inherent powers of—Duty of, to set right wrong done to suitor—See CIV. PRO. CODE*, No. 34, 5 C.L.J. 611.

Court Fees.

(1) *Suit for pre-emption of zamindari and grove—Grove not appurtenant—Separate Court fee not paid on the grove—Dismissal of suit in respect of grove only—See PRE-EMPTION*, No. 12, 4 A.L.J. 408.

Court Fees Act (VII of 1870).

(1) *Suit for possession of land and not for redemption of mortgage—Court fee—Refund of excess fee paid.*

Where the suit as laid was clearly one for possession of land and not one for redemption of mortgage on payment of a certain sum due as mortgage money, the nature of suit as ori-

Court Fees Act (VII 1870).—(Continued).

ginally brought is in no way affected by the fact that the Court decreed possession of the land on payment of a certain sum and that so far as that amount is concerned, the decree was accepted as correct by the plaintiff.

There is no provision in the Court Fees Act under which a Court is empowered to direct the refund of the additional Court fee paid on demand by the taxing officer of the Court. **Puran Singh v. Kesar Singh**, 39 P.R. 1907.

JOHNSTONE and SHAH DIN, JJ.

(2) *Ss. 6, 9, 10 and 28—Plaint admitted and registered—Munsarim's report—Deficiency of Court-fee subsequently discovered—Limitation Act, S. 4—Civ. Pro. Code, S. 392.*

When a plaint has been registered, and a Court, having reason subsequently to think that the market-value, or the net profits of the subject-matter of the claim, have been wrongly estimated, holds an enquiry either *per se*, or through a Commissioner appointed for the purpose, and finds that a sufficient Court-fee has not been paid, it is bound to stay the suit and to fix a time within which the additional fee can be paid, without any regard to the fact whether that be a time within, or beyond, the period of limitation prescribed for the suit. If the fee is paid within the time so fixed, the plaint is as valid as if it had been properly stamped in the first instance when the suit was instituted.

The Court is not bound to appoint a Commissioner to hold an investigation under S. 9 of the Court Fees Act, and S. 10 applies even where the Court itself holds the enquiry.

Mistake is a slip made, not by design, but by mischance, and S. 28, Court Fees Act, is subject to no such limitations as were suggested in *Balkaran Rai v. Gobind Nath Tewari* (a). S. 28 is a universal section and embraces a far wider area than Ss. 9 and 10.

History of Ss. 9 and 10 of the Court Fees Act discussed by Knox, A.C.J.

Per Knox, A.C.J.—The words "insufficiently stamped" cannot be added to the word "plaint" in the explanation to S. 4, Limitation Act (b).

The plaintiff valued his suit at 15 times the net profits which he alleged to be Rs. 45. The plaint was registered. On defendant having raised an objection, the Court of first instance found that the property was undervalued, and dismissed the suit, without giving the plaintiff time to make good the deficiency in Court-fee.

Court Fees Act (VII of 1870).—(Continued).

Held, that the Munsarim's duty not being a piece of perfunctory routine, and the plaintiff having been registered on his report, the Court was bound to give the plaintiff time to make good the deficiency in Court-fee, if any was subsequently discovered. S. 28 of the Court Fees Act applies to such a case. **Hari Ram v. Akbar Husain**, 4 A.L.J. 636 (F.B.)=A.W.N. (1907), 253=2 M.L.T. 375.

KNOX, A.C.J., and BANERJI, BURKITT, RICHARDS and DILLON, JJ.

References:—(a) 12 A. 129, R. (b) N.W.P. 1874, 139, R.

(3) S. 7, IV-C—*Suit by member of Malabar Tarwad to set aside karar entered into during his minority by adult members of the Tarwad—Nature of suit—Application of Rule No. 2 of High Court Rules (Madras)*.

Where a member of the tarwad sues for a declaration that his right as a member is unaffected by a *karar*, entered into during his minority by the adult members of the family including the karnavan, *held* that the right view in such instances is that the transaction would bind members, who are not actually consenting parties, only if the considerations, if any, which pass, and the other attendant circumstances, constituted it a valid exercise of the power of the karnavan and the others, but, otherwise, it is altogether void. Though a transaction, which is void, may, under certain circumstances, be cancelled by a Court, at the instance of a person not party to it, on the ground that it would throw a cloud on his title, it is not true that such a person must get rid of the transaction by having it actually cancelled, in order to rely on its invalidity as against him. In this view, the above suit is a suit for a mere declaration, and not one for declaratory decree with consequential relief falling within S. 7, IV-C. Nor does Rule No. 2 of the High Court rules (dated 26th February, 1903) apply to such a case. That rule must be confined to cases of the precise description provided for by S. 7, IV-C., viz., suits to obtain a declaratory decree or order where consequential relief is prayed. **Chingacham Vittil Sankaran Nair v. Chingacham Vittil Gopala Menon**, 1 M.L.T. 412=30 M. 18.

SUBRAHMANYA AIYAR and MOORE, JJ.

(3-a) S. 7—See No. 17, *infra*.

Court Fees Act (VII of 1870).—(Continued).

(4) S. 7, sub-sec. (IV), cls. (c) and (d)—*Suit for declaratio and consequential relief—Valuation for purposes of Court Fees—Court's power to revise plaintiff's valuation—Civil Procedure Code, S. 54, cl. (b)*.

In cases covered by S. 7, sub-sec. (IV), cls. (c) and (d) of the Court Fees Act, although it is for the plaintiff to state the amount, at which he values the relief sought, and although the amount of Court-fees payable varies with the amount, at which the relief sought is valued in the plaint, it is open to the Court, if a question is raised as to the true valuation of the suit to determine such question, and it is within the power of the Court to take action under S. 54 of the Civil Procedure Code, if it is established that the valuation is improper.

Where the suit was for a declaration that a mortgage-decree for Rs. 10,000 obtained by the defendant against the plaintiff was fraudulent, and for an injunction to restrain the defendant from executing it by a sale of the mortgaged properties,

held—that the prayer for injunction was a prayer for consequential relief within S. 7, Sub-sec. (IV), cl. (c) of the Court Fees Act;

that the proper value of the relief by way of injunction was the amount sought to be realised under the decree, and the plaintiff's valuation of the same at Rs. 100 was so manifestly unjust that the Court was justified in rejecting the plaint under S. 54, C. P. C. (a). **Must. Bibi Umatul Batul v. Must. Nanji Koer**, 11 C.W.N. 705=6 C.L.J. 427.

MOOKERJEE and HOLMWOOD, JJ.

References:—(a) 32 C. 734, R., 17 C. 680, *Appr.*

(5) S. 7, Cl. (4), Sch II, Art. 17, Cl. 1.

Per RUSSELL, AG. C.J.—A suit for a declaration with consequential relief falls under para. 4 (c) of S. 7 of the Court Fees Act, and so it is a suit "other than" those referred to in paras. 5, 6, 9 and 10 (d) of that section.

The words "as determinable" in S. 8 of the Suits Valuation Act, mean determinable by the Court, which has to try the case. **Dayaram Jagjivan v. Gordhandas Dayaram**, 8 Bom. L.R. 885=31 B. 73.

RUSSELL, AG. C. J., and ASTON, J.

References.—2 A. 720, 18 C. 162, 15 P.L.R. Ap. 1=22 W.R. 422, *App.* 14 B. 515, 29 B. 207,

Court Fees Act (VII of 1870).—(Continued).

8 C. 975, 29 B. 229, 17 C. 680, 683, 8 C. 75, 9 B. 20, 27 M. 480 and 8 B. 31, R.

(5-a) S. 7 (4) (c), Art. 17 (6)—Suit to direct registration of will—Art. applicable—See JURISDICTION (OF MUNSIF'S COURTS), No. 1, 17 M.L.J. 578.

(6) S. 7, cls. 5 and 11 (e)—*Landlord and tenant—Suit by tenant to recover possession of land against landlord and persons claiming under him—"Occupancy of land" and "ejected"—Applicability to claim of melwaram in land.*

A suit for possession by a tenant against the landlord and persons claiming melwaram rights under him is governed by cl. 5 and not by cl. 11 (e) of S. 7 (a).

The terms of cl. 11 (e) and especially the words "occupancy of land" and "ejected" are applicable to the case of ryots in actual physical occupation, rather than to persons who are only entitled to the melwaram rights. **Palaniappa Chetti v. Sithravelu**, 17 M.L.J. 478.

BENSON, J.

Reference:—(a) 32 C. 628, F.

(7) S. 7, V (b) and (d) and S. 28—*Court-fee—Document received through mistake or inadvertence.*

The plaintiff in a suit for pre-emption stated in his plaint:—"The suit is valued at Rs. 197-8, five times of Rs. 39-8, the amount of revenue of the property." The property claimed was described as 41 bighas 10 biswas 5 biswansis, paying a revenue of Rs. 39-8, entered as holding No. 2 in the khewat, out of 3 biswa 10 biswansi 18 kachwansi 9 nanwansi 15 tanwansi share, comprising an area of 101 bighas, paying a revenue of Rs. 95, situate in thok Deputy Ali Raza Khan, in village Ukarna." The Munsarim of the Court, in which the plaint was presented on the last day of limitation, accepted this valuation and reported that the plaint was properly stamped.

Held that, inasmuch as the plaintiff had not stated whether the revenue payable in respect of the share claimed had been separately assessed and recorded in the Collector's register as such, it became the duty of the Munsarim to inquire whether it was separately assessed. The plaint had been admitted through the mistake or inadvertence of the officer of the Court, and the plaintiff was entitled to the benefit of S. 28 of the Court Fees Act, 1870. **Hasib-ul-nissa v. Ghafur-ullah Khan**, A.W.N. (1907), 110=4 A.L.J. 363=29 A. 382.

STANLEY, C.J., and BANERJI and BURKITT, JJ.

Court Fees Act (VII of 1870).—(Continued).

(8) S. 7 (9)—*Court Fee for redemption suit—Suit for redemption with prayer for recovery of surplus profits—Improper valuation of Court Fees—See MORTGAGE (REDEMPTION), No. 15, 4 A.L.J. 375.*

(9) S. 7, cl. XI, sub-section cc, (as amended by Act VI of 1905)—*Court Fee—Ejectment. Suit for—*

The Court Fee payable, on a suit for ejectment from a house against a tenant, is chargeable on one year's rent under S. 7, cl. XI, sub-section cc, of the Court Fees Act, as amended by Act VI of 1905, and not on the market value of the house. **Diwan Dillbagh Rai v. Fateh Din**, 24 P.L.R. 1907.

ROBERTSON, J.

(10) Ss. 7, 9 and 10—*Court fee—Net profits or market value wrongly estimated—Limitation—Procedure.*

On a question as to whether the plaint in a suit for pre-emption had been properly stamped, with reference to the net profits of the property in suit, for "the year next before the date of presenting the plaint," an issue was remitted to the lower appellate Court. The finding of that Court was that the amount of profits had been slightly under-estimated. The plaintiff appellant, while contesting the principle upon which the Court below had arrived at its finding, was ready to pay the small deficiency in the Court fee.

Held, that the suit should be remanded to the Court of first instance to be heard on the merits, subject to the payment by the plaintiff of the deficiency in the Court fee (a). **Ghasi Ram v. Hargobind**, A.W.N. (1907), 18.

BURKITT, J.

References:—(a) 27 A. 197, F.

(10-a) S. 9—See Nos. 2 and 10, *supra*.

(10-b) S. 10—See Nos. 2 and 10, *supra*.

(11) S. 11—*Direction in decree to pay extra Court fee—Execution of decree.*

A direction to pay extra Court fee, set forth in the concluding part of a decree, does not form any part of the decree, and no amendment of the decree is necessary to enable the Court to extend the time for payment of the extra fee. The first part of S. 11, and not the latter part, applies to the case, and the intention of the first part is, not that a time should be fixed for the payment of the extra Court fee, but the execution should be stayed,

Court Fees Act (VII of 1870).—(Continued).

until the extra fee payable is paid. The concluding part of the decree is a mere surplusage and does not make execution of the decree conditional upon the payment of the extra fee within the time named by it. **Perianan Chetty v. Nagappa Mudallar**, 16 M.L.J. 548 = 30 M. 32 = 2 M.L.T. 23.

BODDAM and WALLIS, JJ.

- (12) *S. 17—Court fee—Suit embracing two or more distinct subjects—Claim on an agreement to sell with an alternative claim for pre-emption.*

The plaintiff came into Court claiming, in the first place, specific performance of an alleged agreement to sell to him certain immoveable property, and secondly, in the alternative, the enforcement of a pre-emptive right in respect of a mortgage of the same property executed by one of the defendants in favour of the other.

Held, that the suit was, within the meaning of S. 17 of the Act, a suit embracing two distinct subject matters and therefore chargeable with the Court fee assessable upon each alternative relief separately. **Hashmat-un-Nissa Begam v. Muhammad Abdul Karim**, A.W.N. (1907), 4 = 4 A.L.J. 127 = 29 A. 155.

STANDEY, C.J., and BURKITT, J.

- (13) *S. 17. Application of, to cases where reliefs claimed are cumulative—"Two or more distinct subjects," meaning of.*

There is nothing in the language of S. 17, to warrant the operation of the section being confined to cases in which the reliefs are cumulative (a).

The phrase "two or more distinct subjects" in S. 17 may not admit of precise definition applicable to all cases, and it may be that, where reliefs are claimed in the alternative, with reference to the same causes of action, S. 17 would not govern the case. That may also be so, when the relief claimed is one and the same, though the claim is sought to be made out on distinct or alternative grounds. But, where a claim for redemption is based upon the alleged right of the plaintiff as mortgagor, while the alternative relief is based on a contract for a further mortgage, which is distinct from the earlier mortgage right, though both are evidenced by the same instrument, the alternative claims are distinct matters, which could have been made the grounds of separate suits, and it would, therefore, seem to

Court Fees Act (VII of 1870).—(Continued).

be reasonable to hold that they are "distinct subjects," within the meaning of S. 17, for purposes of Court fees and jurisdiction.

Where, therefore, a claim is in the alternative, first, for redemption of a mortgage, the principal amount secured whereby is Rs. 3,000, and in the event of that failing, secondly, to recover, from the defendants, sums aggregating more than Rs. 2,000, on the footing of a mortgage to be executed by the plaintiff (mortgagor) to the defendants, in accordance with certain provisions contained in the earlier mortgage, the suit embraces two distinct subjects and the value of the suit, for purposes of Court fees, is more than Rs. 5,000 and, consequently, the High Court, and not the District Court, has the jurisdiction to hear the appeal from the Subordinate Judge in this case. **Neelakandhan Nambudripad alias Murthi Khandan v. Anantakrishna Ayyar**, 16 M.L.J. 462 = 1 M.L.T. 426 = 30 M. 61.

SUBRAHMANYA Aiyar and BENSON, JJ.

References.—(a) 6 B. 302 and 15 B. 82, R.

- (14) *S. 28—In-sufficiency of stamp on memorandum of appeal—Dismissal thereof.*

The plaintiffs brought a suit for sale upon a number of mortgages against several defendants. A decree was passed in their favour for 28,000 and odd rupees. Some of the defendants, who under the decree were liable to 11,000 and odd rupees, appealed and valued their appeal at that amount, paying Court-fees on the same. In the grounds of appeal, they raised a plea that the suit was bad for misjoinder of parties and causes of action. *Held*, that this challenged the whole decree and Court fees should have been paid on the whole amount decreed. *Held, further*, that S. 28 of the Court Fees Act did not apply, as there was no mistake or inadvertence on the part of the officer of the Court, and time should not be given for payment of the deficiency. **Dilawar Husain v. Bhagwat Das**, 4 A.L.J. 130 = A.W.N. (1907), 63.

STANLEY, C.J. BURKITT, J.

- (15) *S. 28—Presentation of insufficiently stamped plaint—Making up of stamp duty subsequent to the period of limitation for the suit—Validity—See LIMITATION ACT, No. 2, 123 P.R. 1907.*

(15-a) *S. 28—See Nos. 2 and 7, supra.*

- (16) *Sch. I. art. 1—Court fee—Civil Procedure Code, S. 523—Appeal from a decree in accordance with an award.*

Court Fees Act (VII of 1870).—(Continued).

Held that the proper Court fee payable upon a memorandum of appeal from a decree passed in accordance with an award based on an order of reference under S. 523 of the Code of Civil Procedure is an *ad valorem* fee and not a fixed fee of Rs. 10. **Reference under S. 5 of Act No. VII of 1870, A.W.N. (1907), 177.**

AIKMAN, J.

(17) *Sch. I, Art. 1. and S. 7—Portion of mortgaged lands declared not liable for mortgage debt—Appeal against this mortgage decree—Mortgage debt greater than the value of exonerated property—Value of appeal.*

Where the question raised in an appeal is not a question of amount, but is a question as to the liability of certain lands, exonerated from liability by the lower Court, to be proceeded against for a mortgage debt due to the plaintiff, the market-value of the exonerated property, if it is less than the mortgage debt, must be taken to be the value of the subject-matter in dispute in the appeal for purposes of Court fees. Such a case is governed, not by S. 7, but by Art. 1 of Sch. I of the Act. **Kesavar Appu Ramakrishna Reddi v. Kotta Kota Reddi, 1 M.L.T. 311 (F.B.) = 16 M.L.J. 458 = 30 M. 96.**

WHITE, C.J., and BENSON and WALLIS, JJ.

References:—4 M. 339, F; 10 M. 187, Appr; 13 M. 508, R.; and 16 M. 326, Distd.

(18) *Sch. II, Art. 17—Partition suit—Fixed fee or ad valorem fee.*

A suit for partition of joint property is governed by Sch. II, Art. 17, Cl. vi of the Court Fees Act, and the plaint is properly stamped, if a Court fee of ten rupees is paid upon it. A mere denial on the part of the defendant as to plaintiff's title and possession does not convert the suit into one for declaration of title and recovery of possession; the plaintiff is entitled to maintain a suit for partition, if his possession to some part of the joint property is admitted or established, but if it is established that he is not in possession at all of any portion of the joint property, that there has been a complete ouster, he must sue for recovery of possession and partition and pay *ad valorem* Court fees upon a plaint appropriately framed for the purpose. **Bidhata Raj v. Ram Chariter Raj, 12 C.W.N. 37 = 6 C.L.J. 651.**

MOOKERJEE and CASPERSZ, JJ.

Court Fees Act (VII of 1870).—(Concluded).

(18-a) Art. 17, Cl. 1—See No. 5, *supra*.

(19) Art. 17 (6)—Application to file private award rejected—Memorandum of appeal—Court fee—See CIV. PRO. CODE, No. 250, 84 P.R. 1907.

Court of wards.

(1) *Sale of ward's property without his consent—Discretion—Civil Court, jurisdiction of—N.W.P. Land Revenue Act (XIX of 1873), Ss. 194 (g), 203—Court of Wards Act (III of 1899, Local), Ss. 9, 35 and 47.*

Where the Court of Wards assumed superintendence of certain property under S. 194, cl. (g), Act XIX of 1873, it has full power to mortgage or sell the whole or any part of such property, even after the Agra Court of Wards Act came into operation, and the Civil Court cannot question the discretion exercised by the Court of Wards.

Obiter.—If the property had been placed under the superintendence of the Court of Wards under S. 9, Act III of 1899 (Local), and if the sale had been made without the consent of the proprietor, otherwise than on the ground set out in the concluding paragraph of S. 35, the sale would have been bad, and the Civil Court could have entertained a suit to question the power of the Court of Wards to sell. **Mohsan Shah v. Mahbub Ilahi, 4 A.L.J. 495 = A. W.N. (1907), 196 = 29 A. 589**

KNOX, A.C.J. and RICHARDS, J.

(2) Power of, to make commutation of rent in kind into rent in money—See COMMUTATION, No. 1, 6 C.L.J. 727.

Court of Wards Act.

See ACT III OF 1899 (N.W.P.) & ACT IX OF 1879 (BENGAL).

Creditor and debtor.

(1) Relation of—Effect of qualified agreement to pay—See AGENT, No. 1, 6 C.L.J. 639.

Crim. Pro. Code.

(1) S. 195, cls. 6 and 7—Appeals in cases of sanction to prosecute—See SANCTION TO PROSECUTE, No. 5, 17 M.L.J. 266.

Cross objections.

(1)—maintainable only with respect to principal appeal—See CIV. PRO. CODE, No. 275, 10 O. C. 214.

Crown Grants Act.

See ACT XV of 1895.

Custom.

(1) Essentials of—Change of—See PRE-EMPTION, No. 1, 4 A.L.J. 137.

(2) Whether one precedent is sufficient to establish a special—See CUSTOM (PUNJAB), No. 49, 7 P.W.R. 1907.

(3) Evidence as to—Appellate Court's power to supplement evidence—See LANDLORD AND TENANT, No. 3, 6 C.L.J. 218.

(4) Custom relating to a tribe in one locality, applicability of, to same tribe residing in another locality—Custom in accord with judicial experience, value of—Duty of, Court where custom is pleaded by either party—See CUSTOMS (PUNJAB), No. 64, 68 P.W.R. 1907.

(5)—amongst the Bhale Sultan Chattris in Oudh excluding daughters and their issue from inheritance—See HINDU LAW (WIDOW), No. 17, 12 C.W.N. 74 (P.C.).

(6) Evidence to prove custom at variance with the law of the parties—Admissibility—See MAHOMEDAN LAW (SUCCESSION), No. 4, 4 A.L.J. 792.

Customs (Peculiar to Punjab).

(1) *Sheikh Ansaris of Basti Danishmandan, Jullundur District—Status of—Law applicable—Gift by males to females in that tribe, effect of—Gift of land inherited by daughter to her adopted son—Suit by reversioner of last male owner for possession of land gifted—Estoppel by conduct of acquiescence—Limitation Act, Art. 118, applicability of, to invalid adoptions—Distinction between "invalid and inherently invalid" adoption.*

The Sheikh Ansaris are not agriculturists, and there is no presumption that they have adopted agricultural custom; females and, especially, daughters are among them a favoured class; where it is not specifically proved that the tribe, in matters connected with the status of females, have actually adopted agricultural custom or some similar restrictive custom, Mahomedan Law must be presumed to apply (a).

Gifts in lieu of dower, and even ordinary gifts, by males to females in this tribe, make the female donees absolute owners as in Mahomedan Law.

Where certain land inherited by a daughter has been gifted away in favour of her adopted

Customs (Peculiar to Punjab).—(Continued).

son and, subsequently, a reversioner of the last male owner sued for possession of the land, on the ground that the gift was invalid as against him, *held*, from a consideration of the evidence, that the plaintiff had acquiesced in the adoption and in the gift in favour of the adopted son, and was, therefore, estopped from denying the right of the adopted son.

Art. 118, Limitation Act, applies to every case, in which the validity of an adoption is the substantial question, whether it arises on plaint or on defendant's pleas. It is doubtful whether there is any real distinction between an adoption that is "invalid" and one that is "inherently invalid" (b). **Muhammad Niaz-ud-Din Khan v. Muhammad Umar Khan**, 1 P.R. 1907=31 P.W.R. 1907.

JOHNSTONE and RATTIGAN, JJ.

References:—21 A. 341, 9 M.I.A. 287, 12 M. I.A. 350, 42 P.R. 1892, 102 P.R. 1902, 46 P.R. 1900, 34 P.R. 1899, R.

(a) 110 P.R. 1906 (F.B.), R. (b) 67 P.R. 1901, *not F*; 144 P.R. 1892, 71 P.R. 1901, 116 P.R. 1901, 20 P.R. 1902, 56 P.R. 1903 (F.B.), 3 P.R. 1904, 33 P.R. 1900, 24 B. 260 (F.B.), 25 B. 337 (P.C.), 25 B. 26, 20 M. 40, 13 C. 308 (P.C.), 86 P.R. 1905 (F.B.), 55 P.R. 1897, 96 P.R. 1893, 73 P.R. 1894, 14 P.L.R. 1902, 22 C. 609, 25 C. 354, 27 C. 243, 24 A. 195, 26 A. 40 (F.B.), 26 B. 291, R.

(2) *Pre-emption by vicinage in Katra Missar Beli Ram, Amritsar City.*

The custom of pre-emption by vicinage exists in respect of sales of house property in Katra Missar Beli Ram. **Maula Bakhsh v. Devi Ditta**, 6 P.R. 1907=54 P.W.R. 1907.

LAL CHAND, J.

References:—6 P.R. 1905, D; 154 P.R. 1882, 99 P.R. 1906, R.

(2-a) *Pre-emption by right of vicinage in respect of houses, obtaining in Amritsar.*

Held, that the custom of pre-emption, by right of vicinage, in respect of houses, obtained in a large number of the *Katras* or sub-divisions of Amritsar (a).

It was contended in this case that the contiguity of the plaintiff's house at the back of the house in question was not sufficient. *Held*, the fact that the plaintiff's house was situated on the back side, or that it happened to form part of another Municipal Division, was not of any

Customs (Peculiar to Punjab).—(Continued).

importance in considering the right of pre-emption. **Lachman Das v. Kashi Ram**, 140 P.R. 1906=95 P.L.R. 1907.

KENSINGTON and CHITTY, JJ.

References:—(a) 46 P.R. 1882, 154 P.R. 1882 and 58 P.R. 1900, R.

(2-b) *Pre-emption—Parties claiming by right of vicinage—Burden of proof—Kucha Masjid Khajur, Delhi.*

Suit for pre-emption in respect of a house situate in the city of Delhi. The question for decision was whether the plaintiff, whose house adjoined the house sold and opened into the same street, had a preferential right to pre-emption, as against the vendee whose house adjoined the house sold but at the back and opened into a different street. The plaintiff having failed to show the prevalence of the custom alleged by him, *held*, that he was not entitled to the decree sought by him. **Dhumimal v. Kalu**, 67 P.R. 1906=88 P.L.R. 1907.

JOHNSTONE and RATTIGAN, JJ.

References:—17 P.R. 1903, 83 P. R. 1888 and 36 P.E. 1897, F.

(3) *Right of owner of site to pre-empt buildings thereon—Muhalla Khajuranwala, Jullundur City.*

An owner of the site in Muhalla Khajuranwala is entitled by custom to pre-empt the buildings erected thereon. **Fateh Muhammad v. Kariman**, 7 P.R. 1907=42 P.W.R. 1907.

CHITTY and LAL CHAND, JJ.

References:—16 P.R. 1902, 33 P.R. 1885, 75 P.R. 1897, R.

(4) *Succession by right of representation among Mahomedan Kashmiris of Banga, Tahsil Nowashahr, Jullundur District.*

In matters of inheritance, the Mahomedan Kashmiris of Banga are governed by custom, and not by Mahomedan Law, and among them, therefore, the son of a pre-deceased son is entitled by custom to succeed to his grandfather's property by right of representation. **Siraj-ud-Din v. Muhammad Faruk**, 8 P. R. 1907=47 P.W.R. 1907.

LAL CHAND, J.

References:—54 P.R. 1906, 114 P.R. 1898, 80 P.R. 1882, R.

Customs (Peculiar to Punjab).—(Continued).

(5) *Alienation by a childless proprietor—Difference between the status of a childless proprietor and a widow as regards power of alienation—Assignment of the reversionary right—Competency of the assignee to impugn the validity of alienation.*

Held, that the status of a childless proprietor as regards power of alienation of ancestral property, is in no way analogous to that of a widow, and that the difference between the two is, that an alienation by a widow, without necessity, is void, whether there exists any reversioner or not, while such an alienation by a childless proprietor is voidable only by the male lineal descendant of the common ancestor, from whom the property was originally received in inheritance.

Held, that, after devolution of inheritance, a reversioner of a childless proprietor can, subject only to the veto of his own reversionary heirs, assign his interest, wholly or partially, before or pending the suit for possession, or after obtaining a decree for possession, to a stranger, and the alienee steps in the shoes of the alienor for all intents and purposes. **Sher Singh v. Sidhu**, 9 P.W.R. 1907=11 P.R. 1907=80 P.L.R. 1907.

LAL CHAND, J.

References:—12 P.R. 1894 and 27 A. 271 (P.C.); R; 66 P.R. 1897 and 22 P.R. 1900, D.

(5-a) *Alienation—(Gift of ancestral property of a sonless proprietor by his widow to her daughter—Gift over by the daughter again to her daughter—Validity of the gift among Chachars of Mauza Chachar, Shahpur District.*

Though, in effect, the widow of a Chachar, would take his estate for life without power to alienate outside Mauza Chachar, an established custom obtains in the said Mauza which enables the widow to alienate the land of her husband to her daughter if that daughter be married within the village. In the present case, the gift by the widow to her daughter, married within Mauza Chachar and the gift again by the daughter to her own daughter in circumstances precisely similar, not having been shown by the plaintiffs to be invalid, must be *held* to be valid and not contrary to custom. **Nawab v. Wallan**, 91 P.R. 1906=108 P.L.R. 1907.

ROBERTSON and CHITTY, J.

Customs (Peculiar to Punjab).—(Continued).

References:—19 P.R. 1903, D., 82 P.R. 1895, 19 P.R. 1897, 112 P.R. 1900, R.

(6) *Pre-emption in respect of shops—Katra Patranagan.*

No right of pre-emption exists by reason of vicinage in respect of shops in *Katra Patranagan*, Amritsar City. **Karim Bakhsh v. Watta Mal**, 13 P.R. 1907.

REID, J.

References:—46 P.R. 1882, 99 P.R. 1906, 113 P.R. 1906, R.

(7) *Gujars of Gujrat—Right of son-in-law of Khanadamad to inherit.*

Among Gujars of Gujarat District, the son-in-law of a *Khanadamad* cannot be appointed *Khanadamad* and heir to the ancestral estate left by the appointer of the first *Khanadamad*. **Sharfa v. Ramzan**, 14 P.R. 1907.

REID, J.

References:—96 P.R. 1892, 129 P.R. 1893, 19 P.R. 1906, 91 P.R. 1906, R.

(8) *Awans of Rawalpindi Tahsil—Power of a sonless proprietor to will away ancestral property to daughter in presence of his brother—Gifts and wills.*

Among the Awans of Rawalpindi Tahsil, a sonless proprietor can, by custom, make a valid bequest of ancestral property in favor of his daughter, in the presence of his own brother (a). In this respect, gifts and wills are in the same footing (b). **Amir Ali v. Baggo**, 15 P.R. 1907=35 P.W.R. 1907.

JOHNSTONE, J.

References:—(a) 81 P.R. 1879, 64 P.R. 1892, 115 P.R. 1892, 31 P.R. 1893, 23 P.R. 1877, 39 P.R. 1877, 36 P.R. 1891, 81 P.R. 1894, 93 P.R. 1894, 126 P.R. 1894, 15 P.R. 1895, 9 P.R. 1899, 14 P.R. 1903, 8 P.R. 1906, 8 P.R. 1879, 7 P.R. 1891, 107 P.R. 1894, 13 P.R. 1902, 176 P.R. 1888, 53 P.R. 1899, 52 P.R. 1892, 79 P.R. 1896, 49 P.R. 1898, 46 P.R. 1900, 121 P.R. 1886, 171 P.R. 1889, 108 P.R. 1893, 188 P.R. 1895, 22 P.R. 1899, 26 P.R. 1901, 107 P.R. 1887 (F.B.) R. (b) 48 P.R. 1903 (F.B.), R.

(9) *Pre-emption in respect of sale of house property—Kucha Gulzari Shah, Mohalla Wachhowali, Lahore.*

The custom of pre-emption, on sales of house property, based on vicinage, exists in *Kucha Gulzari Shah*, part of Mohalla Wachhowali, a

Customs (Peculiar to Punjab).—(Continued).

sub-division of Lahore. **Sundra Das v. Dhanpat Rai**, 16 P.R. 1907.

ROBERTSON and LAL CHAND, JJ.

(10) *Katra Ahluwalia, Amritsar City—Sale of residential quarters converted into shops—Preemption.*

Property, which is primarily a residential house situate in *Katra Ahluwalia*, is subject to custom of pre-emption by vicinage. It is not sufficient, to change the character of the building as a residential quarter, that, for some time past, it has been occupied only by casual tenants, or that portions have been used as godowns by persons, who held their business shops elsewhere. **Dial Singh v. Bakshish Singh**, 21 P.R. 1907.

ROBERTSON and LAL CHAND, JJ.

References:—108 P.R. 1895, 122 P.R. 1896, R.

(11) *Hindu Bhat Jats of Tahsil Raya Sialkot District—Alienation by sonless proprietor—Right of reversioners of 8th degree to contest alienation.*

Among the Hindu Bhat Jats of Tahsil Raya, an alienation of ancestral land made by a childless proprietor cannot be contested by his collaterals in the 8th degree. **Hira v. Karam Kaur**, 23 P.R. 1907.

ROBERTSON and SHAH DIN, JJ.

References:—93 P.R. 1906, 126 P.R. 1890, R.

(12) *Mohalla Parachian, Rawalpindi City—Pre-emption based on vicinage—Sale of house—Value of cases decided on admission.*

The custom of pre-emption based on vicinage does exist, in respect of sales of house property in Mohalla Parachian or Matta or Waris Khan, Rawalpindi City. Where the right of pre-emption is shown to exist, there is *ex necessitate rei* a presumption in favour of vicinage (a).

Confessions of judgment and admissions are, of course, of much less value than contested cases properly decided where the custom has been found to exist after due enquiry, but such admissions are not irrelevant and by no means valueless, as they may proceed from the consciousness of the existence of the right and the hopelessness of contesting it (b). **Than Singh v. Tara Singh**, 26 P.R. 1907.

CHATTERJI and RATTIGAN, JJ.

References:—(a) 83 P.R. 1888, R. (b) 69 P.R. 1901, 44 P.R. 1903, 42 P.R. 1905, R.

Customs (Peculiar to Punjab).—(Continued).

- (13) *Civil station of Amritsar—Sale of agricultural land—Pre-emption by reason of vicinage.*

There is no custom of pre-emption, on sale of agricultural land, on the ground of vicinage, in the civil station of Amritsar. **Ishwar Das v. Duni Chand**, 27 P.R. 1907.

CHATTERJI and RATTIGAN, JJ.

References:—21 P.R. 1906, 22 P.R. 1906, *Appr.*; 7 P.R. 1896, 153 P.R. 1888, *D.*

- (14) *Khinger Jats, Chakwal Tahsil, Jhelum District—Gift of ancestral land by sonless proprietor to his sister's son and Khanadamad and to his daughter's son.*

Amongst Khinger Jats of Chakwal Tahsil, a sonless proprietor can make a valid gift of his ancestral land to his sister's son and Khanadamad and to his daughter's son in the presence of male collaterals. **Fazal v. Hayat Ali**, 29 P.R. 1907.

CHATTERJI and RATTIGAN, JJ.

References:—22 P.R. 1904, 85 P.R. 1904, 71 P.R. 1904, 33 P.R. 1905, 62 P.R. 1906, *R.*

- (15) *Bedi Khatri of Kalewal, Tahsil Dasuha, District Hoshiarpur—Alienation by sonless proprietor—Reversioner's right to impeach it—Onus.*

It cannot be said that, in the matter of alienation, any custom can as yet have been adopted or followed by the Bedi Khatri of Kalewal, in regard to alienation of ancestral estate. The Burden of proof of a special custom is on the reversioner, who asserts it. **Nihal Chand v. Bhagwan Singh**, 33 P.R. 1907.

JOHNSTONE and RATTIGAN, JJ.

References:—22 P.R. 1891, 122 P.R. 1893, 21 P.R. 1896, *R.*

- (16) *Kashmiri Pundits of Punjab—Adoption by widow without authority from husband, validity of—Evidence of custom.*

An adoption, even though effected by the widow without her late husband's permission, is valid by the custom prevailing among Kashmiri Pundits of the Delhi District, which, in this respect, makes no distinction between boys who are, and boys who are not, members of the deceased husband's family, provided always that the adopted boy must be a Kashmiri Pundit. They are not governed by Mitakshara Law in such matters.

The evidence in support of the alleged custom must be such as shows that, generally, in

Customs (Peculiar to Punjab).—(Continued).

the district, the custom was followed to the exclusion of persons, who, if it had not been for the custom, would presumably have "enforced their rights under the general law" (a). **Maharaj Narain v. Banoji**, 34 P.R. 1907.

CHATTERJI and RATTIGAN, JJ.

Reference:—(a) 16 A. 221, *Appr.*

- (17) *Alienation of ancestral property by issueless proprietor—Nearest reversioner estopped by acquiescence from questioning alienation—Such reversioner's son's right to impeach alienation for want of necessity.*

Where a childless male proprietor sold ancestral immoveable property, the fact that the next reversioner challenged the sale, not for want of necessity, but on the ground that he was ready to pre-empt, which he never did, and his omission at mutations to attack the sale as unnecessary, are circumstances proving that the sale was acquiesced in as a valid sale, and such reversioner's son is, therefore, estopped from suing for possession of the property sold, on the ground that the sale was not effected for necessity. **Lakha Singh v. Jeta Singh**, 35 P.R. 1907.

LAL CHAND, J.

References:—15 P.R. 1902, 42 P.R. 1902, *R.*

- (18) *Gilani Sayads of Mauza Masania, Tahsil Batala, District Gurdaspur—Alienation by sonless proprietor, reversioner's right to question—Alienation for religious purposes.*

The Gilani Sayads of Mauza Masania being agriculturists, and having adopted agricultural customs in matters relating to succession and alienation, the initial presumption against an unrestricted power of alienation is applicable to them. It is not sufficient to rebut such presumption that a number of alienations were effected by members of the tribe to which the parties belonged, unless it is further proved that the alienations effected were such as are unauthorised by the customary law. But a member of the tribe is justified in incurring expenditure for a religious ceremony, such as the *aqiqa* ceremony of his son and the marriage of his first cousin, each item being a necessity, and he is, therefore, justified in alienating a small portion of his ancestral land for such purposes. **Shah Nawaz v. Azmat Ali**, 40 P.R. 1907.

ROBERTSON and LAL CHAND, JJ.

Customs (Peculiar to Punjab).—(Continued).

Reference:—21 P.R. 1896, R.

- (19) *Right of pre-emption claimed by owner of a house opposite to the house in dispute, but separated by a lane—Proof of general custom of pre-emption not sufficient*

In a suit for possession by pre-emption of a house situate in *Katra Kanhayan* in Amritsar, the plaintiff, whose house was situate opposite to the house in suit on the other side of a narrow gully, succeeded in proving that the custom of pre-emption prevailed generally in that place, but did not prove that it would apply in the case of houses, not adjoining or contiguous but opposite to one another. *Held* that the suit should be dismissed, as it was incumbent on the plaintiff to prove, not only the general custom, but such special incident as would make it applicable to his case (a).

Per JOHNSTONE, J.:—Where the plaintiff's house is separated from the house in suit by a road or lane, then, even if the custom of pre-emption prevails in the mohalla or town generally, there is no initial presumption that plaintiff has a right of pre-emption as against a stranger vendee, but plaintiff must prove by instances in the usual way that he has such right. **Mahtub Singh v. Niaz Ali**, 47 P.R. 1907.

JOHNSTONE and CHITTY, JJ.

References:—(a) 107 P.R. 1900, *Diss*; 109 P.R. 1900 and 68 P.R. 1906, *F.*; 71 P.R. 1905, *D.*

- (20) *Pre-emption as regards shops—Katra Rama Garhian, Amritsar City.*

Proof that a custom exists in regard to houses is not sufficient to show that the custom exists as regards shop.

Held that the right of pre-emption in respect of shops in the *Katra Rama Garhian* of the Amritsar City has not been proved. **Sundar Singh v. Mehr Singh**, 54 P. R. 1907 = 40 P.L. R. 1907 = 61 P.W.R. 1907.

ROBERTSON, J.

- (21) *Alienation of ancestral property with a view to institute speculative suit for pre-emption—Legal necessity—Alienee's rights.*

The question of necessity for an alienation has to be determined in each case with reference to its particular facts. No doubt, there may be cases, in which circumstances may justify the temporary alienation of ancestral land by a pre-emptor, for the purpose of raising

Customs (Peculiar to Punjab).—(Continued).

the necessary funds to pay into Court the purchase money; but in all such cases, the contemplated benefit to the pre-emptor's estate, such as would support a finding as to the alienation being an act of good management, must be clearly established. The institution of a speculative suit for pre-emption, which may be unsuccessful and may have been undertaken simply to satisfy a mischievous craving for litigation, can, under no circumstances, be a sufficient justification for alienating ancestral land, and the alienees, who advance money to pre-emptors for such purposes, cannot reasonably ask the Court to regard the alienations made in their favour as for legal necessity. **Sobha Singh v. Kishore Chaud**, 65 P.R. 1907.

ROBERTSON and SHAH DIN, JJ.

References:—67 P.L.R. 1903, R.

- (22) *Pre-emption of houses on vicinage in Mohalla Barwala, Jagadhri town—Instances in neighbouring sub-divisions when relevant—Pre-emptor not intending to retain the property after securing it—Auction sale.*

Held, that the custom of pre-emption of houses on the score of vicinage does prevail in *Mohalla Barwala* of Jagadhri town and that it is not a recognised sub-division of that town.

Held, also, that there is nothing in the law of pre-emption, which prevents a pre-emptor from enforcing his rights, because there is reason to suppose that he does not intend to retain the property in his own hands, after he has secured it.

Held, further, that, where, in a recognized sub-division, some instances of pre-emption are to be found, other instances in the neighbouring sub-divisions are relevant. **Manohar Lal v. Pars Ram**, 38 P.W.R. 1907 = 67 P.R. 1907 = 51 P.L.R. 1907.

JOHNSTONE, J.

*References:—*17 P.R. 1895, and 86 P.R. 1901, *D.*; 38 P.R. 1906 and 99 P.R. 1906, *R.* and *F.*

- (23) *Pre-emption in respect of sale of shops in Katra Ramgarhian, Amritsar City.*

The custom of pre-emption does not exist in respect of shops in the *Katra Ramgarhian* of Amritsar City. **Ram Rakha v. Sant Ram**, 68 P.R. 1907 = 58 P.L.R. 1907.

RATTIGAN, J.

Reference:—54 P.R. 1907, R.

Customs (Peculiar to Punjab).—(Continued).

- (24) *Sekhu Jats of Tahsil Daska, Sialkot District—Adoption of daughter's son—Burden of proof.*

There is no custom among the Sekhu Jats, empowering a sonless proprietor to adopt his daughter's son in the presence of near collaterals. The burden of proof of the validity of such an adoption lies upon those setting it up.

Mohammed Din v. Jawahir, 69 P.R. 1907.

ROBERTSON and SHAH DIN, JJ.

References :—81 P.R. 1900, 29 P.R. 1904, R.

- (25) *Thakar Rajputs in Dada Siba jagir, Congra District—Right of sister's issue to inherit in preference to the Jagirdar Ala Malik.*

A sister's son is not entitled, by custom prevailing among the Thakar Rajputs, to inherit his maternal uncle's property, in preference to the *Jagirdar Ala Malik*. The burden of proving that a sister's issue comes within the category of heirs rests upon the persons so alleging.

Gurditta v. Jai Singh, 72 P.R. 1907.

RATTIGAN, J.

Reference :—175 P.R. 1888, R.

- (26) *Hindu Nandan Jats of Dasuha tahsil, Hoshiarpur district—Adoption of daughter's son—Custom of district—Setting up different custom in particular got—Onus of proof.*

Where the *Riwaj-i-am* applicable to the Jats of Hoshiarpur District, declaring the validity of the adoption of a daughter's son in the presence of male collaterals, is also supported by the circumstance that, in many *gots*, such adoption had actually taken place, the burden of proving the invalidity of such adoption as regards a particular *got* rests on the person, who seeks to set aside such adoption.

Achhar Singh v. Mehtab Singh, 81 P.R. 1907.

CHATTERJI and JOHNSTONE, JJ.

References :—50 P. R. 1893 (F.B.) and 34 P. R. 1899, R. 92 P. R. 1894, D.

- (27) *Dhillon Jats of Tahsil Tarn Taran, Amritsar Dt.—Custom—Adoption of daughter's son.*

Held, that the custom of adoption, as embodied in the *Riwaj-i-am* of 1865, prevailed among Dhillon Jats of Tahsil Tarn Taran of the Amritsar District, and that the adoption of a daughter's son is valid under the said custom.

Sohna v. Sundar Singh, 85 P.R. 1907.

ROBERTSON and SHAH DIN, JJ.

Customs (Peculiar to Punjab).—(Continued).

References :—50 P.R. 1893 (F.B.), 140 P.R. 1894, 33 P.R. 1800 and 86 P.R. 1907, R.

- (28) *Dhillon Jats of Tahsil Tarn Taran, Amritsar District—Custom—Adoption of daughter's son.*

By custom, a sonless Dhillon Jat of Tahsil Tarn Taran has power to adopt his daughter's son.

Buta Singh v. Ram Singh, 36 P. R. 1907.

ROBERTSON, J.

References :—50 P.R. 1893 (F.B.), R.

- (29) *Kalals of Butari, Ludhiana Tahsil—Adoption of sister's son.*

Among Kalals, otherwise called Ahluwalias or Nebs, of Mauza Butari, Ludhiana Tahsil, the adoption of a sister's son by a sonless proprietor is valid by custom.

Attar Singh v. Sant Singh, 87 P.R. 1907.

CHATTERJI and JOHNSTONE, JJ.

References :—C.A. 371 of 1902, 67 P.R. 1904, D; 50 P.R. 1879, 122 P.R. 1893, 50 P.R. 1893, 21 P.R. 1896, 12 P.R. 1906, R.

- (30) *Alienation—Rajputs of Mauza Kharal Kalan and Kharal Khurd in Jullunder and Hoshiarpur Districts—Gift to daughter by sonless proprietor—Burden of proof.*

Held, that the donees, the daughters, on whom lay the onus of proving that, among the Rajputs of the above Mauzas, a sonless proprietor is competent by custom to make a gift of ancestral land to his daughter in the presence of the collaterals of 5th and 3rd degree had failed to prove it and, therefore, such gift to them was invalid.

Nigahia v. Sandal Khan, 83 P.R. 1907.

ROBERTSON and SHAH DIN, JJ.

References :—14 P.R. 1890, 90 P.R. 1881, 46 P.R. 1894, 101 P.R. 1895, 110 P.R. 1894 and 145 P.R. 1895, R.

- (31) *Pre-emption—Agricultural land in suburbs of Lahore—Conversion into building sites—Absorption of the land by Lahore City—Burden of proving custom of pre-emption.*

Certain plot, originally belonging to a certain village in the suburbs of Lahore City, and which was agricultural land, was made the site of about 200 buildings and was absorbed, within recent years, within the limits of Lahore City.

Held that the land was not "agricultural land" within the meaning of the Punjab Tenancy Act of 1887, as it had become a part of

Customs (Peculiar to Punjab).—(Continued).

the City, and that there was no presumption as to custom of pre-emption in respect of sale of such land (a).

Held also that the pre-emptor, on whom lay the burden of proving a custom of pre-emption in respect of that part of Lahore City, or in Lahore City generally, had failed to prove it. **Muhammad Din v. Shah Din**, 90 P.R. 1907.

RATTIGAN and LAL CHAND, JJ.

References:—(a) 87 P.R. 1890 and 21 P.R. 1900, R. 66 P.R. 1903 (P.C.), *cited*.

- (32) *Custom—Brahmins of Dialpur, Tahsil Kasur—Adoption of wife's brother's son—Right of collateral of eight degree to question the validity of adoption—Burden of proof.*

Brahmins of Dialpur, Tahsil Kasur, Lahore District, who are full proprietors with share of Shamilat, and had settled with the founder, and agreed to the same conditions as the Jats, as to the alienation of land and as to the non-succession of daughter, are, in matters of adoption, governed by custom and not by Hindu Law (a).

Held that the defendant, on whom lay the burden of proving, that the collaterals of the eight were not entitled to challenge the validity of adoption, had not discharged that burden (b).

Held also that the onus of proving that an adoption of wife's brother's son was valid by custom in the above community lay on the defendant, and that he had failed to discharge the burden (c). **Ram Chand v. Thakar Das**, 94 P.R. 1907.

CLARK, C.J.

References:—(a) 103 P.R. 1902, D. (b) 35 P.R. 1906, F.; 93 P.R. 1906, D. (c) 94 P.R. 1893, 3 P.R. 1901, D.; 75 P.R. 1892, L.

- (33) *Mair Rajaputs of Chakwal tahsil, Jhelum District—Gift by a childless proprietor of his entire estate to two of his grand-nephews in presence of other nephews and grand-nephews—Valid by custom.*

Among the Mair Rajaputs of the Chakwal tahsil, Jhelum District, a childless proprietor is competent by custom to transfer by gift the whole of his estate in favour of two of his grand-nephews in the presence of other nephews and grand-nephews (a). **Faiz Bakhsh v. Jahan Shah**, 96 P.R. 1907.

RATTIGAN and CHITTY, JJ.

Customs (Peculiar to Punjab).—(Continued).

References:—(a) 1109 P.R. 1882, F. 22 P.R. 1904, 48 P.R. 1903 (F.B.), R.

- (34) *Aroras of Amritsar—Inheritance—Collaterals succeeding to the exclusion of daughter—Custom set up in contravention of the ordinary law—Burden of proof.*

Where it is sought to be proved, that a high caste Hindu community (like the Aroras of the City of Amritsar) are governed by a custom, directly in contravention of their personal law, the burden of proof lies heavily on the party making such an allegation (a).

It cannot be accepted as an axiom, that the Aroras of Amritsar are bound by custom, found to obtain in other parts of the country; but rulings of Courts on question of custom obtaining among Aroras in other parts may be usefully examined.

Held, that, in this case, the defendants had not established the custom they set up, of collaterals succeeding among the Amritsar Aroras, to the exclusion of daughters (b). **Radho v. Harnaman**, 99 P.R. 1907.

ROBERTSON and CHEVIS, JJ.

References:—(a) 16 A. 221; 34 P.R. 1907; 110 P.R. 1906; 24 A. 273; 24 P.R. 1893; 45 P. R. 1900, R. (b) 144 P.R. 1882; 85 P.R. 1884; 148 P.R. 1890 (note); 62 P.R. 1902, R.

- (35) *Inheritance—Bunjahi Khatri of Rawalpindi—Hindu Law—Right of collaterals to succeed in preference to daughter's son and grandson—Possession by widow of pre-deceased son of her father-in-law's estate—Adverse possession—Limitation.*

The Bunjahi Khatri of Rawalpindi follow Hindu Law of the Mitakshara school. They have not become agriculturists and do not follow Jat custom. In that tribe, near collaterals do not exclude daughters, daughter's sons and grandsons of a deceased sonless proprietor (a).

The burden of proving the existence of a special custom excluding them from inheritance lies in the collaterals.

Where the widow of a deceased son held her father-in-law's estate after his death, not as of right, but in lieu of maintenance, the property yielding only just enough for her maintenance, held, that her possession was not adverse to the real heir, whoever he may be, inasmuch as she did not assert any rival right or arrogate to herself the position of a trespasser (b).

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A subsequent assertion by the widow, in a suit by the collaterals in which the Court declared that the collaterals were entitled to succeed after her death, that she held for life, could not show that her possession was adverse (c). Nor could the decree in the suit make the question of heirship of collaterals *res judicata* against daughter's son (d).

Bunjahi Khattris, though they may follow their personal law, do not always follow it in every particular. This tribe may have adopted a variation under which the widow of a predeceased son takes the same widow's estate which she would have taken had her husband survived his father (e). **Bura Mal v. Narain Das**, 102 P.R. 1907.

CHATTERJI and JOHNSTONE, JJ.

References :—(a) 54 P.R. 1906, 15 P.R. 1902, 94 P.R. 1898, R; (b) 3 P.R. 1904, D; (c) 24 P.R. 1906, R; (d) 28 M. 457, R; (e) 178 P. L. R. 1905, R.

(36) *Alienation—Arains of Naraingarh—Widow's power of alienating non-ancestral property—Power of widow to make son-in-law khanadamad—Gift to daughter and son-in-law—Right of collaterals of first degree—Validity of gift.*

Under Customary Law, the widow of a deceased male proprietor, in possession of his estate for life, is subject to the same restriction in alienating non-ancestral estate of her husband as in alienating ancestral estate (a).

She could, in the presence of reversioners, cousins of first degree, alienate only to some one having a better right to inherit, or to some one else, only if there is in existence some one whose existence bars these reversioners. The existence of a daughter does not preclude cousins of first degree from contesting an alienation made by a widow in possession of property.

Among the Naraingarh Arains, the widow of a deceased male proprietor in possession of her husband's property cannot make her son-in-law *khanadamad* in the sense that he thereby becomes as it were a son. Nor can she in the presence of collaterals of third degree make a gift of that property to her daughter and son-in-law. **Muhammad Umar v. Abdul Karim**, 108 P.R. 1907.

CHATTERJI and JOHNSTONE, JJ.

References :—(a) 98 P.R. 1891, 18 P.R. 1895, 63 P.R. 1895, 28 P.R. 1893, 58 P.R. 1899, R.

Customs (Peculiar to Punjab).—(Continued).

(37) *Alienation—Jats of Mathothial got of mauza Kulchpur, tahsil Kharian, Gujrat District—Gift by sonless proprietor inheriting from mother to whom property was given by her father—Gift of ancestral estate to resident daughters.*

A sonless proprietor of Mothilal got of the above mauza, inheriting property from his mother, who had received it from her father, can make a gift of it to a resident daughter and her husband, a *Khanadamad*, in the presence or near collaterals. **Imam Din v. Mulla**, 104 P.R. 1907.

CHATTERJI and JOHNSTONE, JJ.

References :—4-109 P.R. 1891, 106 P.R. 1901, R.

(38) *Alienation—Aroras of Tahsil Chakwal, Jhelum District—Hindu Law, whether applicable—Alienation of ancestral property.*

In matters of alienation, Aroras of Tahsil Chakwal, Jhelum District, who are members of a tribe or caste which *prima facie* does not belong to an agricultural community, are governed by Hindu Law, and not by custom. Among them, therefore, a sonless male proprietor is not precluded from selling or even gifting a part of his ancestral property to his sister's son, and such alienation is binding upon the reversioners (a).

Members of non-agricultural tribe are not to be held bound by customs prevailing among agricultural tribes, simply because they happen to own lands, and to be living with members of agricultural tribe (b). **Gohra v. Hari Ram**, 115 P.R. 1907.

RATTIGAN and LAL CHAND, JJ.

References :—(a) 22 P.R. 1904, 71 P.R. 1904, 122 P.R. 1893, 62 P.R. 1902, F; (b) 122 P.R. 1893, 94 P.R. 1898, 107 P.R. 1901, 61 P.R. 1903, 12 P.R. 1906, R.

(39) *Inheritance—Bilochis of Dera Ghazikhan—Right of daughter and daughter's son to succeed in preference to collaterals—Mahomedan Law.*

From the answers recorded in the Customary Law of the Dera Ghazikhan District, it is clear that, with the exception of certain sections of the Nutkani tribe in Sangarh, the Belochis of that District generally and especially those of Dera Ghazikhan Tahsil, follow their own custom and not Mahomedan Law. A widow is among

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them entitled merely to maintenance and daughters do not, in any case, succeed to any portion of their father's ancestral property in the presence of male collaterals of the father. **Bakht Sawal v. Sardar Khan**, 119 P.R. 1907.

JOHNSTONE and RATTIGAN, JJ.

(39-a) *Inheritance, among Arains of Ludhiana, whether widow entitled to inherit along with step-son.*

The question in this case was whether plaintiff as the widow of one N was entitled to claim a half share in the inheritance from N as against her step-son, the son of N by another wife. The lower Appellate Court maintained that the plaintiff, as a widow, is entitled, by custom, to half the estate of her husband on a life tenure and decreed for her accordingly. *Held*, following *Shada v. Jio* (a), that an alleged custom that a widow is entitled, as of right, to a share in presence of sons by another wife, is one of which clear and strong proof should be required and that in the present case the plaintiff, on whom the onus lay of proving the customs on which she relied, having failed to discharge the same, her suit to receive a half share in the inheritance must be dismissed, though she might be entitled to receive cash maintenance. **Elahi Bakhsh v. Khewni**, 116 P.R. 1906 = 93 P.L.R. 1907.

RATTIGAN and LAL CHAND, JJ.

Reference :—(a) 107 P.R. 1886, R.

(39-b) *Inheritance—Widow's right to succeed to her deceased husband's collaterals—Alienation by widow—Right of collateral's widow to contest such alienation—Ghirths of Kangra District.*

Plaintiff, a Ghirth by caste, in tahsil, Hamirpur, District, Kangra, sued to set aside an alienation by the widow of a collateral of her deceased husband, on the ground that she was entitled to succeed to such collateral by virtue of a custom prevailing in the District. Her right to succeed collaterally and her right to question the alienation were disputed by the defendant. *Held*, that, by virtue of a custom among Ghirths in the District in question, a widow was entitled to succeed collaterally to any property to which her husband, if alive, could have succeeded, and that, consequently, the plaintiff was competent to question the alienation in question. **Lahori v. Radho**, 72 P.R. 1906 = 108 P.L.R. 1907.

CLARK, C.J., and LAL CHAND, J.

Customs (Peculiar to Punjab).—(Continued).

References :—56 P.R. 1891, 111⁶ P.R. 1891, and 20 P.R. 1895, R.

(40) *Pre-emption—Muhalla Wadharian, Sialkot City—Right of purchaser to be compensated for improvement.*

The custom of pre-emption based on contiguity exists in Muhalla Wadharian, Sialkot City.

Where a purchaser of a house, subject to the right of pre-emption, makes improvements on it, in spite of the pre-emptor's notice not to do so, the purchaser would not, generally, be entitled to recover the market-value of the improvements and would only be allowed to remove them, when it could be done without injuring the house. But, where the improvements are not unusual and do not greatly enhance the value of the property so as to make it difficult for the plaintiff to pay for them, the plaintiff will have to pay the defendant's expenditure. **Buta Singh v. Tara Singh**, 122 P.R. 1907.

CHATTERJI and JOHNSTONE, JJ.

(41) *Pre-emption—Loss of right—Vendee becoming co-sharer before institution of suit.*

Held, that the plaintiff, who was at the date of sale a co-sharer in the land in suit, could not claim pre-emption in respect of the sale of that land as against the vendee who at the date of sale was not a co-sharer therein but became a co-sharer before the plaintiff instituted his suit for pre-emption (a). **Sardar Darchan Khan v. Sohaura Mal**, 3 P.L.R. (1907) = 48 P.W.R. 1907 = 124 P.R. 1907.

RATTIGAN, J.

References :—(a) 138 P.R. 1884; 73 P.R. 1898; 47 P.L.R. 1905; 49 P.R. 1901 = 157 P.L.R. 1901; 95 P.R. 1901 = 125 P.L.R. 1901; 32 P.R. 1902 = 30 P.L.R. 1902; 26 A. 389; 21 A. 374, 441; 75 P.L.R. 1903, R.

(42) *Alienation—Gift by childless proprietor of ancestral property—Awans of Jullundur District.*

A childless Awan, in the Jullundur District, has not the absolute and uncontrolled right to give away ancestral land to strangers and non-relations, to the prejudice of his collateral relations, though his powers of disposition are undoubtedly large. **Barkat Ali v. Jhandu**, 127 P.R. 1907 = 81 P.W. R. 1907.

CHATTERJI and JOHNSTONE, JJ.

Customs (Peculiar to Punjab).—(Continued).

- (43) *Inheritance—Sister's right of inheritance to a deceased male proprietor—Nature of her right.*

When a proprietor, following the customary law of the Punjab, dies leaving no sons but a sister, the sister should, for the purposes of inheritance, be regarded as only the sister of that proprietor, and not as a daughter of his father. **Hamira v. Ram Singh**, 134 P. R. 1907 (F.B.).

CLARK, C.J., and CHATTERJI & JOHNSTONE, JJ.

References:—103 P. R. 1900, 110 P. R. 1906 (F. B.), *Diss.*; 117 P. R. 1893, 171 P. R. 1888, 46 P. R. 1891 (F. B.), *D*; 134 P. R. 1907 (Note), *F*.

- (44) *Inheritance—Right of sister to inherit—Collaterals—Burden of proof.*

When a man, without brothers, dies sonless in a tribe in which the daughter excludes the collaterals, it cannot be held that his sister has the same rights as a daughter and also excludes collaterals. The burden of proof lies upon her to prove a special custom in her favour, when she is contesting, with ascertained collaterals, however distant, the right to inherit the property of the deceased. **Saidan Bibi v. Fazal Shah**, 134 P. R. 1907 (Note).

CHATTERJI and JOHNSTONE, JJ.

References:—71 P. R. 1892, 24 P. R. 1905, 41 P. R. 1895, 46 P. R. 1895, 4 P. R. 1891 (F. B.), 12 P. R. 1892 (F. B.), 171 P. R. 1888, 140 P. R. 1893, 172 P. R. 1889, *It.* and *D*.

- (44-a) *Right of adopted son to succeed his natural father—Existence of natural brother—Jats of Tahsil Paniput, Karnal District.*

The question for decision in this case was whether, among the Jats of Tahsil Paniput, a son adopted into another family can succeed to his natural father when the latter leaves behind him another natural son. *Held*, the adopted son (plaintiff) was not entitled to succeed his natural father and take a share in the latter's estate, when there is in existence another natural son and when the adopted son, as it was found in this case, took by inheritance the entire estate of the adoptive father. **Mukh Ram v. Not Ram**, 100 P. R. 1906 = 101 P. L. R. 1907.

ROBERTSON and CHITTY, JJ.

Reference:—68 P. R. 1898, *It.*

Customs (Peculiar to Punjab).—(Continued).

- (45) *Pre-emption—Kucha Billa Kabutarbaz in Muhalla Kabuli Mal—Inference of custom of pre-emption—Co-sharer's superior right of pre-emption.*

The custom of pre-emption prevails in *Kucha Billa Kabutarbaz* in *Muhalla Kabuli Mal*.

Where, in a small blind alley, no case of pre-emption has occurred, but, in lane running into it, cases of pre-emption have occurred, it is a reasonable inference that the custom of pre-emption prevails in the blind alley (a).

The right of pre-emption of a co-sharer in the property sold is superior to that of the owner of a neighbouring house (b). **Allah Ditta v. Raj Kumar**, 138 P. R. 1907.

JOHNSTONE, J.

References:—(a) 83 P. R. 1901, 6 P. R. 1905, *R*; (b) 71 P. R. 1905, *R*.

- (46) *Marriage—Hindu Law—A Khatri Kuka Sikh married to Tarkhani and Jat woman—Act XV of 1856.*

Held, that, according to custom, the marriage of a Khatri Kuka Sikh with a Tarkhani or Jat woman in *Karena* form is not invalid, and the offspring of such union are not illegitimate. **Ranjit Singh v. Isa**, 15 P. L. R. 1907.

CHATTERJI and KENSINGTON, JJ.

Reference:—P. R. 73 of 1897, *referred to*.

- (47) *Adoption of daughter's son among Dhillon Jats of Tehsil Tarn Taran, District Amritsar.*

Held, that adoption of daughter's son among DHILLON JATS OF TEHSIL TARNA TARAN, DISTRICT AMRITSAR, is valid according to custom (a). **Bela Singh v. Amar Singh**, 2 P. W. R. 1907 = 25 P. L. R. 1907.

HURRY, J.

Reference:—(a) Civil Appeal No. 960 of 1895 followed.

- (48) *Jats of Kadipur, Tehsil Gurgaon—Adoption of father's sister's son's son, plea of limitation to defence—Indian Limitation Act (XV of 1877), Ss. 4 and 28.*

In 1893, R. adopted G., his father's sister's son's son. One of the reversioners, respondent, N (Lambardar), actually affixed his seal to the mutation proceedings. But none of the reversioners brought any suit to get the adoption set aside.

Shortly after R's death, G sued R's reversioners to get his land in Kadipur, Tehsil

Customs (Peculiar to Punjab).—(Continued).

Gurgaon. The first Court decreed the claim finding the adoption proved and valid. The Divisional Court confirmed the decree inferring validity of the adoption from the circumstance that adoption of sister's son is allowed among the Jats of the tribe to which the parties belonged.

Held, by the Chief Court, that as the general feeling is against the adoption of daughter's or sister's son, except among certain tribes, adoption of father's sister's son's son cannot be assumed valid by analogy of these special customs without proof of appropriate instances to the point.

Held, also, that S. 4 of the Indian Limitation Act (XV of 1877) has no bearing on defences and pleas, but only on suits or appeals and so forth.

Held, further, that S. 28 of the said Act cannot apply to persons in possession, against whom a suit has been brought in respect of that property so as to prevent them from offering any defence they please. **Baldeo v. Gajwa**, 3 P.W.R. 1907 = 26 P.L.R. 1907.

JOHNSTONE, J.

(49) *Pre-emption of land in Jandiala, Tahsil Phillaur, District Jallundur, by own brother of the vendor, only on the ground of relationship—Clause 12 (b) of the Punjab Laws Act IV of 1872—Tenure of the Village Bhya Chara—Entry in the Wajab-ul-arz—Sharik Shikmi—One precedent not sufficient to establish a special custom.*

S. based his claim of pre-emption of the land situate in Jandiala, Tahsil Phillaur, District Jallundur, on the ground that he was own brother of the vendor and the village was held on ancestral shares.

The first Court decreed the claim. The Divisional Court, without giving any definite finding as to the tenure of the village, dismissed the suit, on the ground that S was not one of the descendants of the original founders of the village and, therefore, had no superior right by reason of relationship.

Held, by the Chief Court, with reference to the Settlement Records, that the tenure of the village is *Bhya Chara* and, consequently, S cannot succeed under S. 12 (B) of the Punjab Pre-emption Act merely by reason of his being brother of the vendor.

Customs (Peculiar to Punjab).—(Continued).

Held, also, that no custom giving S a superior right of pre-emption, as regards the property in dispute, has been proved, as the entry in the *wajib-ul-arz* of the village is inapplicable to his case and the one instance given by him is altogether inconclusive to prove the special custom. **Sher Singh v. Sawan Singh**, 7 P.W.R. 1907 = 35 P.L.R. 1907.

LAL CHAND, J.

(50) *Pre-emption—Pre-emption on sale of agricultural land on ground of vicinage—Mauza Chathan Miran Khan, Tahsil Shujabad, Multan District.*

Plaintiff and defendant were both *Khewatdars* in the village, in which the land sold was situate. The plaintiff's claim for pre-emption was based on the ground of vicinage. *Held*, that, the custom of vicinage not having been established by the plaintiff, the plaintiff's suit was liable to dismissal. **Thakar Das v. Metan Mal**, 77 P.R. 1906 = 67 P.L.R. 1907.

JOHNSTONE and RATTIGAN, JJ.

Reference :—49 P.R. 1889, R.

(51) *Inheritance—Moghals of Pind Dadan Khan Tahsil—Sons of an adopted son entitled to succeed collaterally in their natural family.*

Special custom might exist in certain localities prohibiting a son of an adopted son from succeeding in his natural family but the reason that would induce an adopted son to give up his rights in his natural family as against his own brothers would not apply, or at all events not with the same force, where it is a question of his succeeding collaterally, *e.g.*, where he comes to have a claim against his natural uncle's estate as in the present case in which the parties were Moghals of Pind Dadan Khan Tahsil. **Ghela v. Haider**, 59 P.R. 1906 = 68 P.L.R. 1907.

CLARK, C.J.

(52) *Muhammadian Kashmiris of Lahore city, matters of inheritance among, whether governed by Muhammadan Law or subject to Customary Law.*

The main issue in this case was whether the plaintiffs-appellants, who were Kashmiri Muhammadans, were governed in matters of inheritance by Muhammadan Law or by custom. They belonged to families engaged in trade or manufacture and resident in the city of Lahore. *Held*, the burden of establishing

Customs (Peculiar to Punjab).—(Continued).

the existence of a custom modifying the rule of Muhammadan Law on the subject, was on the respondents, the question raised being whether females inherit, in accordance with Muhammadan Law, or are excluded by males in accordance with custom. The oral evidence for the respondents was, in many cases, that of men who had themselves profited by the exclusion of females and whose interests were obviously opposed to their admitting the rights of females. Further, the presumption in favour of custom is no greater among the Kashmiris than it is among the Muhammadan carpenters of Multan (a) or among Arain market-gardeners of Delhi city (b) and, in the absence of clear evidence to the contrary, the Cashmiri weavers and traders of Lahore city are to be held to be governed by Muhammadan Law and not by custom. **Maula Baksh v. Muhammad Baksh**, 54 P. R. 1906=74 P.L.R. 1907.

CLARK, C.J., and REID, J.

References :—(a) 47 P. R. 1900, R. (b) 23 P. R. 1897, R.

(53) Pre-emption, right of, on sale of shops—Chandini Chowk Bazaar, Delhi City—Vicinage.

Suit for pre-emption in respect of the sale of a shop in the Chandini Chowk Bazaar of Delhi City. The plaintiff was the owner of a house at the back of the shop in question. The defendant was a stranger to the locality. The questions for decision were (1) the existence of a custom of pre-emption applicable to shops in the Chandini Chowk, and (2) whether the plaintiff who was an owner of a house at the back of the shop not opening on to the Chandini Chowk itself but on to a side street, was entitled to exercise right of pre-emption. *Held* (1) that the custom of pre-emption in respect of sale of shops does exist in the Chandini Chowk Bazaar of Delhi City and (2) the plaintiff, as the owner of a house at the back of the shop in question, was entitled to exercise the right of pre-emption, the defendant vendee having failed to prove a special local custom disentitling the owner of a house at the back to exercise the right of pre-emption as against a mere stranger to the locality. **Prag Ra v. Murari Lal**, 81 P.R. 1906=75 P.L.R. 1907.

KENSINGTON and CHITTY, JJ.

References :—88 P.R. 1905, F., 17 P. R. 1895, R.

Customs (Peculiar to Punjab).—(Continued).

(54) Succession among Jats of Ludhiana, to estate of deceased adopted son leaving no son—Right of heirs of adoptive father of deceased.

Under the general principles of succession to ancestral land, in a Punjab village community, as laid down in prior Full Bench cases (a), it was held in this case that by custom prevailing among the Jats of Ludhiana, on the death of an adopted son, without leaving any male lineal descendants, the estate held by the deceased, as such adopted son, would not pass to the collateral heirs of the natural family of the deceased, but would at once revert to the adoptive father and then descend to the descendants of the latter. **Gurditta v. Atar Singh**, 117 P. R. 1906=77 P. L. R. 1907.

RATTIGAN and LAL CHAND, JJ.

References :—(a) 4 P.R. 1892 (F.B.) & 12 P.R. 1892 (F.B.), F. 58 P.L.R. 1901, D.

(55) Pre-emption—Mohallah Kabir Darwazar City (Gujarat)—Pre-emption as regards one shop and two houses—S. 11 of the Punjab Laws Act (IV of 1872)—Instances in adjoining Mohallas.

Held, that Kabir Darwazar Mohalla in the city of Gujarat is a District Sub-division within the meaning of S. 11 of the Punjab Laws Act (IV of 1872), and that there is no custom of pre-emption in this Mohalla on the sale of shop or house property.

Held, also, that instances in the adjoining Mohallas, though relevant are not conclusive proof of the existence of the custom. **Rahim Bakhsh v. Sheikh Fazal Elahi**, 17 P.W.R. 1907.

CHITTY, J.

(56) Brahmins of Sampla Tehsil, Rohtak District—Gift to a daughter—Donee dying without lineal descendants—Reversion of the gifted land to the line of the donor—Meaning of Waris—Value of Rivaj-i-am supported and unsupported by instances—Gift by donee's sonless Waris—Suit by collaterals of donor.

Found that, according to the custom among Brahmins of Sampla Tehsil, as laid down in the Rivaj-i-am of the said Tehsil, the land gifted to a daughter reverts, on the failure of the male lineal descendants of the donee, to the line of the donor.

Customs (Peculiar to Punjab).—(Continued).

Held, also, that where any of the male lineal descendants of the donee, who succeeds to the gifted land, is sonless, and alienates it to a person not entitled to inherit it, according to the above rule, the reversioners of the donor can maintain a declaratory suit to protect their rights and that, by the term "Waris," is meant a person entitled to succeed to the donated property.

Held, further, that the provisions of a Rivaj-i-am, which are in accord with the principles of general Customary Law, must be regarded as *prima facie* correct, but where they are not so, they are *per se* insufficient to prove any custom, in the absence of instances in their support.

Shadi v. Richa Ram, 24 P.W.R. 1907.

RATTIGAN and LAL CHAND, JJ.

- (57) *Necessity—Sale by a childless proprietor of ancestral land to acquire another land—Suit by collaterals whose father had abandoned some land and lived in another village—Suit for possession and declaration combined—General prayer for getting such relief as the Court may think fit to grant—Jagir and Khatuni Assamiwar registers received in evidence.*

The plaintiffs, collaterals of a childless proprietor, sued for possession of half the land sold by him, as their own property and for a declaration that the sale was not to affect their reversionary rights in the other half. The plaint contained a further general prayer for such other relief as the Court thought they were entitled to get.

Defendants, (1) justified the sale, (2) challenged the plaintiffs' status to bring the suit, urging the land in dispute was not ancestral and that their father had given up his right to some of it in 1884 and that (3) the Divisional Judge was wrong in granting the declaratory decree for the whole area when the suit was for a declaration to half only.

Held, that, (1) with reference to the *Jagir* and *Khatuni Assamiwar* registers, the land was ancestral and it did not lose its character by reason of plaintiff's father abandoning a portion of it in favour of his nephew in 1884;

(2) Exchange or sale of ancestral land to acquire other land is generally not a necessity justifying the alienation;

(3) Plaintiffs were competent to sue as their father had retained expressly his jagir rights and not parted with his interest in a large portion of the land in dispute; and,

Customs Peculiar to Punjab.—(Continued).

(4) that declaratory decree for the whole area was justifiable as, in the plaint, there was a general prayer for such relief as was possible to give and greater relief claimed embraces the lesser. **Nihal Singh v. Jowala Singh**, 26 P.W.R. 1907.

HURRY and LAL CHAND, JJ.

References:—81 P.R. 1901 and 75 P.R. 1902 D.

- (58) *Adoption—Mere deed and admission of adoption per se not sufficient to establish adoption—Rivaj-i-am—Effect of not complying with its provisions relating to adoption.*

Held, that mere execution of a registered deed of adoption, coupled with an admission in the suit to contest it, is not sufficient to constitute and prove a customary adoption, and to hold that such an act *per se* is sufficient, would reduce adoption, a well-recognized institution with its peculiar features and special legal incidents, to the mere level of an ordinary bequest.

Held, also, that where a *Rivaj-i-am* requires that either a special feast should be given to the brotherhood or that the deed of adoption be executed in their presence but neither of the facts is shown to have taken place, the mere execution of a registered deed of adoption *per se* is not sufficient to constitute a valid customary adoption. **Lachhman Singh v. Mit Singh** 29 P.W.R. 1907.

LAL CHAND, J.

References:—154 P.R., 1904 F.; 40 P.R. 1905, D.

- (59) *Pre-emption of houses and shops in Mohallas Haripur and Nimwala Bazar on Jagadhri Town on the ground of vicinage—Value of instances in Neighbouring Sub-Divisions.*

Held, that Mohalla Haripur is a recognized Sub-Division of Jagadhri Town, and that the custom of pre-emption of houses on the ground of vicinage prevails in it.

Held, also, that in *Nimwala Bazar*, which is a distinct Sub-division of Jagadhri Town, the custom of pre-emption of shops on the score of vicinage does not prevail.

Held, further, that the existence of the right of pre-emption in other neighbouring Sub-Divisions is relevant evidence of more or less strength according to circumstances, of its existence in

Customs (Peculiar to Punjab).—(Continued).

the Sub-Division in which the property is situate, but is not, of itself, sufficient proof of custom. *Ramjidas v. Jethu Mal*, 39 P.W.R. 1907.

STODDON and CHATTERJI, JJ.

(84) Pre-emption in bhaya chara village on ground of relationship—Proof of special custom—Custom of whole tahsil tribe by tribe—See PRE-EMPTION, No. 14, 44 P.R. 1907.

(60) Adoption of distant agnate—"Jats" of Amritsar District.

Held, that according to custom prevailing among Jats of Amritsar District, adoption by a childless proprietor of a distant agnate in the presence of nearer ones is not invalid. *Nidhana v. Shaman*, 7 P.L.R. 1907=43 P.W.R. 1907.

ROBERTSON and LAL CHAND, JJ.

(61) Succession—Agnates of a deceased proprietor whether mere community of descent gives right of succession to, in respect of lands acquired in a different village from that of the proprietor—Cases governed by Customary Law, when personal law should be resorted to in the decision of.

The question was referred to the Full Bench, in this case, whether it was laid down by certain decided cases and particularly by *Lokha v. Hari* (a) that mere community of descent gave the agnates of a deceased land-owner no right of succession to acquired land let by him in a village, in which they did not own any land, and whether such a rule could be deduced from the well-established principles of Customary Law. *Held*, that, although the language in *Lokha v. Hari* (a) is not free from doubt, there is no clear indication of any intention, either in that decision, or in any of the others referred to, to lay it down as a rule that mere community of descent could not give the agnatic descendants of a deceased proprietor a right to succeed to his lands in a village, in which they do not own any land and that such a rule is not supported by judicial precedent and is not fairly deducible from the general principle of Customary Law.

Another point argued in this case and treated as one on which an expression of opinion, by the Full Bench, was required, was, whether, among parties ostensibly governed by Customary Law, it was permissible to fall back on their personal law for the decision of the point in issue, where no definite rule of the former law applicable to the case before the Court could be found. It

Customs (Peculiar to Punjab).—(Continued).

was held (CLARK, C.J., and KENSINGTON, J., dissenting).

Per CHATTERJI, J.—A statement by the parties that they are governed by the Customary Law cannot be conclusive on the point and absolve the Court from the duty of ascertaining and applying the proper law to be administered. The allegation of the parties cannot, by itself, justify the Courts, after legitimate methods of enquiry into custom failed to derive from it a rule of decision, in refusing to look beyond Customary Law for such a rule. So, where there is no rule of decision available under Customary Law, the Courts are bound to fall back on personal law as a last resort.

Per REID, J.—A party who comes into Court with the allegation that he is bound by Customary Law is not precluded from falling back on his personal law and it is the duty of the Court, whenever necessary, to ascertain and administer the same.

Per ROBERTSON, J.—In regard to matters dealt with in S. 5 of the Punjab Laws Act, when any custom is set up and proved to obtain, custom shall be the rule of decision, but, when no such custom has been established, the rule of decision shall be the personal law of the parties whether or not they can be shown to be governed in certain other matters by custom. *Daya Ram v. Soheli Singh*, 110 P.R. 1906 (F.B.)=31 P.L.R. 1907=59 P.W.R. 1907.

CLARK, C.J. & REID, CHATTERJI, ROBERTSON and KENSINGTON, JJ.

References:—(a) 64 P.R. 1893; 18 P.R. 1896, 73 P.R. 1896 and 103 P.R. 1900, considered and discussed.

(62) Alienation—Gift by a Chhimba occupancy tenant of Mauzia Bhaman Kalan, Lahore District, of his ancestral holding to his daughter's sons—Suit by reversioners to contest the alienation maintainable even after it has been successfully challenged by the landlords—Punjab Tenancy Act (XVI of 1887), Ss. 59, 60, &c.—Presumption of custom that the tenant is incompetent to alienate—Onus probandi.

Held, that where the reversioners of an occupancy tenant are entitled to succeed to his holding under the Punjab Tenancy Act (XVI of 1887), in the case of his dying sonless, they can maintain a suit to declare that by custom he is incompetent to alienate his holding and that its alienation by him shall not affect their reversionary rights, if any, notwithstanding

Customs (Peculiar to Punjab).—(Continued).

that the alienation has successfully been challenged by the landlords according to provisions of the said Act.

Held, also, on the analogy of 17 P.R. 1885, 80 P.R. 1896, 51 P.R. 1901, 6 P.R. 1902, 96 P.R. 1905 and 89 P.R. 1906, that, as agriculture has formed the sole occupation of the family of the *Chhimba* parties, in this case, for several generations, and as they appear to have settled in the village with the Jat proprietary body, their landlords, the presumption is that they have adopted the custom of Jats as regards inheritance; and that the donees have to prove that the donor (B) is competent to gift his ancestral occupancy holding to them, and as they have failed to show, either that by custom B is competent to do so, or that a Jat sonless proprietor of the village can gift his ancestral holding to his daughter's son, the gift in dispute is invalid and shall not affect the reversionary rights of S and others.

Obiter.

Held, further, that in such a case the said right of the reversioners is not enforceable where the tenant's alienation, allowed by the Punjab Tenancy Act (XVI of 1887), is in favour of the landlord (a). **Bhag Singh v. Sharm Singh**, 60 P.W.R. 1907.

RATTIGAN and LAL CHAND, JJ.

References:—(a) 88 P.R. 1895, 89 P.R. 1898 (F.B.), 49 P.R. 1889, 69 P.R. 1900, 12 P.R. 1904, 21 P.R. 1905, F; 31 P.R. 1896 (F.B.), 115 P.R. 1901; 5, 12 and 58 P.R. 1906, D.

(68) *Alienation by mutation of names—Construction of mutation proceedings—Rebutting circumstances of an entry in the Settlement Records that a person is a tenant—Recognition of existing right—Claim by reversioners.*]

K was entered as sole owner and founder of a village in the Settlement Record of 1872-73, and his nephew was described therein as a tenant-at-will of a certain area of that village. It also contained an entry to the effect that since 5 years M had separated his cultivation from K.

In Jamabandi of 1888-89, M was shown in possession of 250 *kanals* as his *khud kasht* and in joint possession with his cousins. This area was very nearly equal to one-sixth of the village. In 1889, H, M and C, three sons of K admitted in a mutation proceeding that M had 1/6th share of the estate. H had then two adult sons, but

Customs (Peculiar to Punjab).—(Continued).

none of them objected. In 1905 two sons of H, one of whom had just attained majority and the other was born six years after 1889, treated the mutation proceeding as an alienation of 1/6th share and sued to get it declared invalid.

Held, upon the above facts, that M was in reality an owner of 1/6th share long before 1889, and the admission of that year was a mere recognition of an already existing right and gave no cause of action to the reversioners.

Held, also, that whether a mutation proceeding embodies merely a recognition of existing right or is intended by the parties to take effect as an alienation by gift is to be deduced from the circumstances of each case. **Nur Muhammad v. Sardara**, 65 P.W.R. 1907.

RATTIGAN and LAL CHAND, JJ.

(64) *Shamsi Khojas of Lahore District—Succession—Muhammadian Law—Customary right of representation—Onus—Duty of Court to enquire custom—Act IV of 1872, S. 5—Relevancy of instances in other localities.*

Held, that Muhammadan Shamsi Khojas of Lahore District, who are Hindu converts to Islam and were originally Khatris or Aroras by caste, follow custom in matters of inheritance, and that customary right of representation which extends to collateral as well as to lineal succession, is recognised by them, and the rule of Muhammadan Law, which excludes issue of a predeceased person, is wholly inapplicable to them (a).

Obiter.—

Held, also, that S. 5 of Act IV of 1872 makes no distinction between agriculturists and non-agriculturists, and lays down a rule of decision for all classes without distinction of caste, creed or calling, and that there is no initial presumption in favour of personal law under the provisions of this section; and that it is the duty of the Court trying the case, to ascertain at first the rule of decision by enquiring into the custom pleaded by either party, and on the failure of proof of such custom, to apply the provisions of their personal law (b).

Held, further, that cases relating to the same tribe, residing in different localities, are applicable and relevant to prove a custom of theirs, when there is social intercourse between the different sections of the tribe, who reside in those localities; and that, where an alleged custom is in accord with judicial experience

Customs (Peculiar to Punjab).—(Continued).

and forms one of a few customs found to prevail in a Province, even a few instances un rebutted by any to the contrary would decisively be sufficient to prove the alleged custom, but such is not the case when the alleged custom is unusual or exceptional or opposed to established usages or those found by judicial experience (c). **Matab Din v. Abdullah**, 68 P.W.R. 1907.

RATTIGAN and LAL CHAND, JJ.

References :—(a) 27 P.R. 1868 and 52 P.R. 1888, F; (b) 81 P.R. 1874, F; (c) 8 P.R. 1882, 175 P.R. 1883, 192 P.R. 1883, 39 P.R. 1884, 71 P.R. 1887, 4 P.R. 1888, 3 P.R. 1890, 122 P.R. 1893, 23 P.R. 1898, 91 P.R. 1899, 47 P.R. 1900, 41 P.R. 1901, 30 P.R. 1903, 54 P.R. 1903, 41 P.R. 1904, 51 P.R. 1904, 54 P.R. 1906, and 8 P.R. 1907, R.

(65) **Custom—Adoption—Alienation—Act XXI of 1850—Mohammadan convert's right to contest alienation by his Hindu collateral—Bengal Code, Reg. VII of 1832—Agriculturist Khatri of Bahadarpur Tehsil Batala, District Gurdaspur, bound by custom—Adoption contrary to the terms of Rivaj-i-am invalid—Acquiescence.**

Mohammadan converts are entitled to challenge the alienation of an ancestral holding made by their Hindu collateral even if remotely related to them; and they are not estopped from doing so by reason of their standing by, when the alienee was appointed Lambardar or the common land was partitioned in the alienor's life-time, as long as their claim is within limitation.

Held, also, that where the Rivaj-i-am provides that only a collateral can be adopted, the adoption of a stranger is invalid.

Held, further, that when a Khatri and his ancestors had been purely agriculturists for generations he is as much bound by the customary law as if he had belonged to any ordinary agriculturist tribe (a). **Jiwan v. Harnam Das**, 77 P.W.R. 1907.

BENTON and FRIZELLE, JJ.

References :—(a) 82 P.R. 1890, 126 P.R. 1890, 11 A. 100, R.

(66) **Succession to occupancy tenancy—Adopted son of occupancy tenant associating strangers with him—Right of collateral heirs of adoptive father to succeed to the adopted son dying childless—See ACT XVI of 1887 (PUNJAB TENANCY), No. 7, 76 P.R. 1907.**

Customs (Peculiar to Punjab).—(Concluded).

(67) **Pre-emption in respect of shops in villages—See ACT II of 1905 (PRE-EMPTION PUNJAB), No. 6, 80 P.R. 1907.**

(68) **Suit by reversioner to restrain alienation of occupancy rights by occupancy tenant—Proof of custom—See BURDEN OF PROOF, No. 2, 98 P.R. 1907 = 62 P.W.R. 1907.**

(69) **Effect of Act II of 1905 on proof of special custom for the enforcement of pre-emption—See PUNJAB ACT II of 1905 (PRE-EMPTION, PUNJAB), No. 7, 143 P.R. 1907.**

Cutchi Memons.

(1) *Doctrine of survivorship applies to—Law applicable—Duty of persons lending money to.*

The doctrine of devolution by survivorship applies to a family firm of Cutchi Memons; but Mahomedan, and not Hindu, law is applicable to the relationship between the manager and the members of a Cutchi Memon family firm. Hence, persons advancing loans to the manager of such firm are under no obligation to inquire whether advance of moneys to the firm was strictly necessary.

A family firm is not a partnership within the meaning of the Indian Contract Act, because such an association requires the individual assent of all the members to it.

The position of a family firm carried on by Cutchi Memons is between that of a joint Hindu family and that of a partnership under the Indian Contract Act. Cutchi Memons acquire their father's estate as Hindu "universitas." If that estate comprises a family firm, it survives to them as Hindus. After-born members acquire an interest in it on their birth. But in the conduct of business, they are governed by Mahomedan law (a).

A partner in a trading firm may draw, endorse, etc., *hundis* for the purpose of partnership (b). **Haji Noor Mahomed v. N. C. Macleod**, 9 Bom. L.R. 274.

RUSSELL, J.

References :—(a) 14 B. 189, 20 B. 53, 8 C. 826, 3 C.L.R. 97, 31 B. 258, 6 Bom. L.R. 874 (1887), R.; (b) 6 Moor. P.C. 193, F; J. 425, 21 B. 808, 6 Bom. L.R. 878, R.

Cy pres doctrine.

(1) *Application to charity provided by a Parsi donor.*

Where under altered circumstances, through lapse of time or through other causes, it appears

Cy pres doctrine.—(Concluded).

to the Court, that the charity provided by the donor could not be carried out literally in terms of his directions, with any benefit whatever to the objects of his benefaction, the Court ought not to hesitate to give its sanction to a scheme, which will carry out the charitable intentions of the donor, to be gathered from the instrument establishing the charity, as nearly as possible to the original intentions of such donor. *In re Hormasji Framji Warden*, 9 Bom. L.R. 1208.

DAVAR, J.

(2) Bequest to family idol—Disposal of residue—See *IDOLS*, No. 1, 9 Bom. L.R. 370.

Dam.

—in the bed of the stream—Obstruction—Damage—See *RIGHT OF SUIT*, No. 3, 9 Bom. L.R. 864.

Damage.

(1) Special—words imputing unchastity actionable without proof of—See *DEFAMATION*, No. 1, 4 C.L.J. 388 = 34 C. 48.

Damages.

(1)—for breach of contract—Vendor and purchaser—Contract to sell immoveable property—Damages for breach of the contract—Contract Act (IX of 1872), S. 73.

The rule in *Flureau v. Thornhill* (a) and *Bain v. Fothergill* (b), that the purchaser of real estate cannot recover damages for the loss of his bargain, but only his deposit and expenses, does not apply to cases of wilful default, nor to unreasonable omission to complete the title by taking some definite steps in the vendor's power (c).

In India, in cases of breach of contract for sale of immoveable property through inability on the vendor's part to make a good title, the damages must be assessed in the usual way, unless the parties expressly or impliedly contract that such inability should not make the vendor liable for damages. *Ranchhod Bhawan v. Nanmohandas Ramji*, 9 Bom. L.R. 1087.

MACLEOD, J.

References:—(a) 21 W.L. B.L. 1078, *Diss.*; (b) 7 Eng. and Ir. Ap. 158, *D*; (c) 42 B. 659, 2 Cl. 320, *F*; 11 B. 272, *not followed*.

(2)—for breach of contract, suit for—Limitation—Damages, how and when accrue—Assessment of damages, principles of—Limitation Act (XV of 1877), Sch. II, Art. 116

Damages.—(Concluded).

--Express covenant, breach of Indian Contract Act (IX of 1877), S. 73—Collateral or consequential damages—remote and indirect damages or loss, if recoverable.

A contract may be broken quite as much by repudiation of liability under it, as by making it impossible to fulfil the terms of the contract.

Art. 116 of Sch. II of the Limitation Act applies to a suit for compensation for the breach of a contract in writing and registered, and the suit is in time if it is commenced within six years from the date when the contract was broken.

Where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed (a).

Where two parties have made a contract which one of them has broken, the damages which the other ought to receive in respect of such breach of contract, should be such as may fairly and reasonably be considered, as arising naturally, that is, according to the usual course of things, from such breach of contract itself; the damages may be such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. The damages, however, cannot include compensation for any remote and indirect loss or damages sustained by reason of the breach (b).

Where a person agrees to pay and discharge an incumbrance and neglects to perform his covenant within the time fixed therefor or within a reasonable time if none is fixed, the covenantee is ordinarily entitled to recover the present amount of the incumbrance (c). *Daswant Singh v. Syed Shah Ramjan Ali*, 6 C.L.J. 398.

MOOKERJEE and HOLMWOOD, JJ.

References:—(a) 1 Exch. 850 (855), *R*. (b) 9 Exch. 341 (354); 7 Ch. D. 490 (494), *R*. (c) 2 B. and Ad. 778; 5 B. and Ad. 78; 39 R.R. 405; 5 Ex. 21 D. 280; 34 Iowa, 71; 11 Am. Rep. 138; 181 Mass. 93; 41 Am. Rep. 199, *R*.

(3)—resulting from acts done under cover of execution proceedings, suit for, maintainability of—Execution Court—Jurisdiction—See *Civ. Pro. CODE*, No. 117, 6 C.L.J. 527.

Darkast Rules.

- (1) *Power of Civil Courts to question reasons assigned by Revenue authorities for granting or refusing applications for Darkast—Board's Standing Order, No. 15, Rules 4, 5, 7, 11, 13 and 14—Whether grant of patta is a matter of Contract.*

A grant of land was made to the plaintiff, on a *Darkast* application made by him to a *Tahsildar*, under Rule 4 of Standing Order No. 15 of the Board of Revenue, subject to the result of any appeal that might be preferred. The appellate revenue authority annulled the grant, on the ground that there was irregularity in issuing "A" notice, by reason of the signatures of the adjacent land-holders not having been obtained.

Held, by WHITE, C.J. :—Regarding the omission to obtain such signatures, it must, in the absence of evidence to the contrary, be presumed that the officers took the signatures, other than those of adjacent land-holders, because the adjacent land-holders were absent or illiterate. The maxim "*Omnia præsuntur rite esse acta*" applied. The fact of such omission did not *per se* render the *Tahsildar's* grant invalid and the grant was, therefore, binding on the Crown.

It is open to a Civil Court to set aside an order of an appellate Revenue tribunal.

Held, by BENSON, J. :—The *patta* is in the nature of a mere bill and not of a grant or conveyance. The issue of a *patta* has not the effect of confirming the conditional grant by a *Tahsildar*, during the pendency of the appeal.

It is not open to Civil Courts to discuss the sufficiency, or otherwise, of the grounds on which the *Darkast* authorities—whether original or appellate—grant or refuse Government lands to applicants, so long as they act within the scope of their authority.

Obiter.—It would be different if the Revenue authorities, purporting to act under the *Darkast* rules, acted outside the scope of their authority. *Muthu Yeera Yandayan v. The Secretary of State for India in Council*, 1 M.L.T. 278 = 29 M. 461; appeal thereon dismissed 2 M.L.T. 141 (F.B.) = 30 M. 270.

WHITE, C.J. and BENSON, J.

References.—26 M. 268, 18 M. 494, 26 M. 742, 12 M. 404, 19 M. 324, 6 M. 308 and 1 M.I.A. 305, B.

Death.

- (1) *Presumption as to*—See EVIDENCE ACT, No. 22, 5 C.L.J. 649.

Death illness.

- (1) *Essentials of*—See MAHOMEDAN LAW (GENERAL), No. 1, 9 Bom. L.R. 252.

Debt.

Right to debt not extinguished, though the remedy to recover may be barred—See CONTRIBUTION, No. 3, 12 C.W.N. 60.

Debutter.

- (1) *Personal decree against shebait—Proceeding against debutter estate in execution—Claim on behalf of idol allowed—Compromise binding debutter estate—Legality—Prudent management.*

A *shebait* of an idol having taken a lease, the landlord sought to obtain a decree against the *debutter* estate, but a personal decree only was made against the *shebait*. In execution, the landlord attached certain property, to which the *shebait* preferred a claim on behalf of the idol, and the claim was allowed. The *shebait* then entered into an agreement with the landlord, under which he undertook to surrender the lease and to pay a certain sum in settlement of all claims. The greater portion of this sum was paid in cash, and for the balance, he assigned rents due from certain tenants, and it was stipulated that, if the rents proved insufficient, the balance might be recovered from the *debutter* estate.

Held, that, under the circumstances, the *shebait* had acted prudently and for the ultimate protection of the *debutter* estate in entering into the agreement, and it was binding on the *debutter* estate.

The possession of a *shebait* in relation to the idol examined by Mookerjee, J. *Nawab Sir Syed Hossain Ali Khan v. Mohant Bhagwan Das*, 11 C.W.N. 261 = 34 C. 249 = 6 C.L.J. 442.

RAMPINI and MOOKERJEE, JJ.

- (2) *Permanent lease by shebait void and not voidable—Adverse possession—Acceptance of rent, effect of.*

A permanent lease of *debutter* property is void if not executed for legal necessity.

The plaintiff's predecessor who had a *karsha* lease obtained a permanent lease from the *shebait* of an idol, the predecessor of defendant No. 2, on payment of a bonus, and the latter

Debutter.—(Concluded).

who is the present *shebait* continued to receive rent from the plaintiff. Subsequently defendant No. 2 determined plaintiff's lease and took possession. In a suit for possession by the plaintiff,

held, that plaintiff's possession under the permanent lease, which was found to have been executed without legal necessity, and therefore held to be void, cannot be regarded as adverse to defendant No. 2, nor can the latter's acceptance of rent from the plaintiff either operate as an admission of the plaintiff's having a permanent right in the land or cause an extinction of his own previous title. **Nitya Gopal Sen Poddar v. Mani Chandra Charabuttu**, 12 C.W.N. 68.

RAMPINI, C.J. and SHARFUDDIN, J.

(3)—estate is represented by female trustee as fully as by male trustee—Limitation Act, Art. 141, applicability of—See **ESTOPPEL**, No. 2, 6 C.L.J. 621.

(4)—private—Conversion into secular property—Consensus of family—Debutter, nominal or real—Test—See **RELIGIOUS ENDOWMENTS**, No. 6, 12 C.W.N. 98.

Declaratory decree.

(1) Decree directing performance of puja and giving of honours to a deity according to the usage of a religious institution—Nature and execution of decree—See **CIV. PRO. CODE**, No. 99, 2 M.L.T. 94.

(2) Decree declaratory in form—Execution of such decree—See **EXECUTION OF DECREE**, No. 2, 17 M.L.J. 423 (F.B.).

Declaratory suit.

(1) *Suit for declaration of right to receive fees as "chowdhris" of certain bazaars—Suit not maintainable.*

The plaintiffs sued for a declaration that they were the "chowdhris" of the bazars in the villages Muhammadabad Gohna, Khairabad and Behna, and that the defendants were not the "chowdhris" of the said bazaars and were not entitled to take chowdhris' dues. *Held* that such a suit was not maintainable. **Barsati v. Chamru**, A.W.N. (1907), 228=4 A.L.J. 715=29 A. 688.

BANERJI and AIKMAN, JJ.

References.—N.W.P.H.C.R. (1867), pp. 80, 271, N.W.P.H.C.R. (1869), p. 291, F.

Declaratory Suit.—(Concluded).

(2) Suit by reversioners for a declaration that they were entitled to redeem—Discretion of Court—See **SPECIFIC RELIEF ACT**, No. 8, 2 M.L.T. 67.

(3) Suit for declaration of exclusive right to act as Khatib, when maintainable—See **RIGHT OF SUIT**, No. 5, 17 M.L.J. 421.

(4) Suit for declaration of title with consequential relief—Court fee—See **Court FEES ACT**, No. 5, 8 Bom. L.R. 885=31 B. 73.

(5) Suit for declaration that plaintiff is more eligible to be manager of religious endowment than defendant—Maintainability—See **ACT XX OF 1868 (RELIGIOUS ENDOWMENTS)**, No. 2, 4 A.L.J. 774.

(6) Omission to seek further relief, when such relief is possible—Duty of Court—Amendment of plaint—See **SPECIFIC RELIEF ACT**, No. 9, 128 P.R. 1907.

(7) Suit by a person in possession for a declaration of his title to immoveable property—Entry in revenue records of the title of defendant as owner—Subsequent partition-proceedings—Period of limitation—See **LIMITATION ACT**, No. 98, 140 P.R. 1907.

Decree.

(1) *Decree prescribing a condition—Appellate decree confirming it—Time for performance of condition—Construction of decree.*

A decree of the appellate Court merely confirming the decree of the lower Court does not give the plaintiff fresh time for performing a condition of the original decree (a).

A decree of the original Court provided that on the plaintiff's paying into Court the balance of consideration, within a month from the date of the decree, the defendant should execute a sale-deed of the suit land in plaintiff's favour. The plaintiff did not pay the amount within the month, and after the expiration of that period, the defendant appealed. The decree of the appellate Court simply confirmed the decree of the lower Court. *Held* that the plaintiff would not be entitled to execute the decree, on making a deposit of the amount within a month from the date of the appellate decree.

It is desirable that appellate Courts should frame their decree in such a manner as to leave no doubt as to whether it is intended to extend the time for performing the conditions precedent imposed by the original decree. **Ramasamy Kone v. Sunda Kone**, 17 M.L.J. 495.

BENSON and WALLIS, JJ.

Decree.—(Concluded).

References:—(a) 11 A. 346, 11 B. 172, 13 C. 13, 15 M. 170, 25 C. 311, 18 A. 223, 15 B. 370, 23 A. 152, R.

(2) See CONSTRUCTION (OF DECREE).

(3) Effect of a—obtained through fraud and misrepresentation—See EXECUTION OF DECREE, No. 9, 17 M.L.J. 165.

(4)—for mesne profits against father, sons and grandsons if bound—See HINDU LAW (DEBTS), No. 5, 11 C.W.N. 163=5 C.L.J. 80.

(5) Making additions in, not warranted by judgment—See CIV. PRO. CODE, No. 89, 9 Bom. L.R. 547=31 B. 447.

(6)—,when to be set aside for negligence of guardian—Test—What should minor prove—See GUARDIAN AND MINORS, No. 2, 6 C.L.J. 448.

(7)—against minors—Nāzir representing as guardian *ad litem*—Ex parte decree, whether illegal or invalid—See MINOR, No. 3, 9 Bom. L.R. 1099.

(8)—passed against benamidar binds beneficial owner—See BENAMI TRANSACTIONS, No. 3, 4 A.L.J. 689.

(9) Adjudication on rights of defendants in an interpleader suit is a, and appealable—See CIV. PRO. CODE, No. 7, 4 A.L.J. 683.

(10) Order of District Judge, dismissing suit under S. 158, C.P.C., amounts to decree—See CIV. PRO. CODE, No. 84, 10 O.C. 245.

(11) Suit to set aside, on ground of fraud—Sole question raised in suit already decided in proceedings under S. 108, Civ. Pro. Code—See RES JUDICATA, No. 22, A.W.N. (1907), 191.

(12) Reversing decree as to part of disputed property and remanding the suit as to remainder—Piece-meal decision—See PRACTICE, No. 1, 9 Bom. L.R. 966.

(13)—in partition suit, finality of—See PARTITION, No. 2, 2 M. L.T. 265.

(14)—Final order for foreclosure or redemption, whether a—Appeal—See TRANSFER OF PROPERTY ACT, No. 53, 3 N.L.R. 146.

(15) Form of decree—Suit against successor in the office of manager of a *mutt* for debt incurred by predecessor—See RELIGIOUS ENDOWMENTS, No. 7, 17 M.L.J. 553.

Decree-holder.

(1) Application by transferee of decree-holder, whether “in accordance with law”—See CIV. PRO. CODE, No. 5, 2 M.L.T. 339.

Defamation.

(1) *Cause of action—Special damage—Unchastity, imputation of.*

A used words which imputed unchastity to the wife of X:

held, (1) that the words constituted defamation, not only of the wife of X, but also of X himself, and X was, therefore, entitled to maintain an action on his own account; (2) that the words were actionable without proof of special damage. **Sukan Tell v. Bipal Tell**, 4 C.L.J. 388=34 C. 48.

RAMPINI and WOODROFFE, JJ.

Dekhan Agriculturists' Relief Act.

See ACT XVII OF 1879 (BOMBAY).

Deorha.

Provision for payment of interest in the shape of, whether enforceable—See CIV. PRO. CODE, No. 275, 10 O.C. 214.

Deposit.

(1) *Refund of, suit for—Deposit as security for faithful and due discharge of duties—Limitation—Limitation Act (XV of 1877), Sch. II, Arts. 120 and 145—“Deposit”, “depository”, meaning of—“Moveable property”, if includes money—Return in current coin, if return in specie—Art. 120, when applicable.*

Art. 120 of Sch. II of the Limitation Act (XV of 1877) is final and residuary, and includes all suits not specially provided for, and the Court ought not to regard a case as coming under that article unless clearly satisfied that it does not come under any of the many articles dealing with specific cases (a).

Per Mookerjee, J.—The term “moveable property” as used in Art. 145 of Sch. II of the Limitation Act includes money, and is not restricted in its application to cases where property is recoverable in specie (b).

Although the term “deposit” ordinarily implies the deposit of specific property returnable in specie, it has a wider meaning.

If a Government security or a sum of money is delivered to be held as security for the performance of some engagement, and upon the express or implied understanding that the thing deposited is to be restored to the owner as soon as the engagement has been fulfilled, the person with whom the deposit has been made may rightly be treated as a depository within the meaning of Art. 145 of the second schedule of the Limitation Act (c).

Deposit.—(Concluded).

Per Holmwood, J.—A return of deposit made in current coin is a return in specie, the term specie meaning, when applied to money, current coin of the Realm as opposed to bullion.

An article of the Limitation Act which fully applies to a particular case should not be thrown aside because it might create hardship in other cases. **Lala Gobind Prasad v. Chairman of Patna Municipality**, 6 C.L.J. 585.

MOOKERJEE and HOLMWOOD, JJ.

References :—(a) 26 C. 564, *R*; (b) 28 I.A. 227=24 A. 27, 8 B. 17, 11 B. 133, 22 C. 877, 22 M. 478, *R*; (c) 31 C. 519 (526), 12 C. 113, *R. and F.*

Descent of Jagirs Act (Punjab).

See ACT IV OF 1900.

Digwari tenure.

(1) Minerals, right to—*Digwari Jaigir, of Manbhum, nature of—Mokarari lease of all surface and sub-soil rights granted by Digwar—Government, consent of—Government, rights of—Landlord, rights of—Sankarari ijara settlement—Government, if a necessary party—Constructive possession—Wrong-doers or trespassers—Limitation—Ejectment—Digwari tenure, if analogous to Ghatwali tenures—Digwar, right of, character of—Resume of the history and law on the subject—Resumption of tenure.*

The circumstances that the Digwar has all along been responsible to Government for the due discharge of his duties, that the appointments to and dismissals from the office have been all along made by Government and that the (*Digwari*) tenure has passed to the persons whom Government has appointed, show that the holder of the tenure is not a servant under the landlord responsible to him for the due collections of the rent of the estate, and that he did not hold the tenure as a simple *ijardar* under the landlord responsible to him for the rents of the tenure and receiving as his remuneration only the *man* lands.

The *Digwari* tenure is an ancient and hereditary tenure held subject to the payment of a fixed rent to the landlord, and on condition of the performance of certain Police or public services, for the due discharge of which the holder has been responsible to the Government, which alone has exercised the power of appointment to or dismissal from the office.

Digwari tenure.—(Continued).

The Government having all along asserted a right in the *Digwari mouzahs* on the ground that they are public service lands, and in granting permission to the *Digwar* to lease out the property, subject to the condition that the settlement was to be made without prejudice to the rights of Government, the same position having been maintained by Government, without any objection having been raised by the landlord, and the landlord having advanced an exclusive right to the sub-soil profits, in which the Government has a substantial interest as affecting the profits derivable from the tenure, the Government is, in a suit brought by the landlord for a declaration that the sub-soil belongs to him and not to the *Digwar* or his lessee, a necessary party (a).

Constructive possession applies only in favour of a rightful owner and need not (as a rule) be extended in favour of a wrong-doer, whose possession must be confined to land of which he is actually in possession (b).

Occupation by a wrong-doer of a portion of land only cannot be held to constitute constructive possession of the whole so as to enable him to obtain a title by prescription.

Where the right to the sub-soil coal has not been asserted by the *Digwar* openly to the knowledge of the landlord for more than the statutory period of twelve years, though there may have been no concealment that the *Digwar* has been working the coal, a suit by the landlord for the sub-soil cannot be held to be barred by limitation (c).

The enactments dealing with the *Ghatwals* of *Birbhum* are not of the nature of private statutes.

A clear distinction must be drawn between the grant of an estate burdened with certain duties and the grant of an office, the performance of whose duties is remunerated by the use of certain lands; and a further distinction must also be drawn between a grant for services of public nature and one for services, private or personal to the grantor. The former class of grants in such instance are liable to resumption by the grantor, while the latter class are not so liable (d).

The *Digwari* tenure having been created in the first instance to enable the holder to discharge public duties, and it all along having been so regarded, it is not liable to resumption by the landlord.

Digwari tenure.—(Concluded).

The position of the *Digwar* is analogous to that of the *Ghatwals* in Birbhum and the *Digwar* having been recognized throughout as possessing the same rights, it must be held that the mineral rights in the tenure do not belong to the zemindar (e).

The tenure was created as a permanent tenure on a fixed rent and was heritable, the zemindar reserving only a fixed quit rent (f).

The *Digwar*, as holder of a permanent tenure possesses all underground rights including mining rights, unless there is an express reservation to the contrary (g). **Brojo Nath Bose v. Raja Sri Sri Durga Persad Singh**, 5 C.L.J. 588 = 34 C. 753.

BRETT and SHARFUDDIN, JJ.

References:—(a) 21 B. 229, 44 Ch. D. 374, *Distgd.* 13 B.L.R. 118; 22 W.R. 52; 5 C.L.R. 154, R. (b) 24 C. 256, R. (c) 31 C. 397, 19 W.R. Eng. 444, 6 Ch. D. 719, 1 Ch. and Lef. 8, R. (d) 13 Moo. 1. A. 438 (463), 22 C. 938 (941), R. (e) 5 C. 389 on appeal 9 C. 187, R. (f) 22 C. 533 (543), 11 M.I.A. 433 (466), R. (g) 3 C.L.J. 59, F. 3 C.L.J. 306, 33 C. 203 (215), R. 9 C.W. N. 292 and 2 C.L.J. 20, D.

Discretion.

(1) Exercise of, must be according to well-established rules and not arbitrary—See ACT VIII OF 1885 (BENGAL TENANCY), No. 23, 11 C. W.N. 1143.

Distrait.

(1) Right of—See LANDLORD and TENANT, No. 10, 10 O.C. 41.

Drainage Act.

See ACT VI OF 1880 (BENGAL).

Easements.

(1) *Obstruction of view to a shop—Removal of constructions.*

The defendants built a shed and put *sirkis* screens on their own land in front of the plaintiff's shop, the view to which was obstructed on account of these constructions.

Held, that the plaintiff was not entitled to have the construction removed on the ground that the view to the shop was interrupted from the neighbouring road. **Gopi Nath v. Mussamat Munno**, 3 A.L.J. 637 = A.W.N. (1906), 257 = 29 A. 21.

BANERJI, J.

References:—35 L.J., Ch. 317 and L.R., 2 Ch. 158, R.

Easements.—(Concluded).

(2) *Light and air—Interim injunction—Quia timet action.*

There are two necessary ingredients for a *quia timet* action. There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage will be very substantial or irreparable. **Gangabai v. Purshotum Atmaram**, 9 Bom. L.R. 912.

MACLEOD, J.

(3) *Privacy—Apertures—House overlooked from other open spaces of the same—Effect of.*

Where the defendant opened certain apertures towards the plaintiff's house, which was already overlooked by the defendant's house in several places, *held* that there was a substantial and material invasion of the right of privacy. The apertures would permit a person to look on without being observed (a). **Abdul Rahman v. Bhawan Das**, 4 A.L.J. 445 = A.W. N. (1907) 183 = 29 A. 582.

KNOX, J.

Reference:—(a) 10 A. 358, *Distgd.*

(4) Acquisition of, by tenants—Custom—Evidence—Duty of landlord—See LANDLORD AND TENANT, No. 3, 6 C.L.J. 218.

(5) Claim under, inconsistent with alternative claim as owner—See ALTERNATIVE CLAIMS, No. 1, 4 C.L.J. 437 = 11 C.W.N. 20 = 1 M.L.T. 364 = 34 C. 51 (F.B.).

Easements Act (V of 1882).

(1) S. 4—*Right of privacy, interference with—Suit by occupier.*

A lessee or a person in lawful possession of a house may maintain an action if the right of privacy of the house, of which he is in possession, is interfered with. **Kundan v. Bidhi Chand**, 3 A.L.J. 670 = A.W.N. (1906), 283 = 29 A. 64.

AIKMAN, J.

Reference:—10 A. 358 (387), *commented on.*

(2) Ss. 7, 15, 16, 33 & 35—*Light and air coming laterally over the land of another—Prescription—Obstruction to ancient light—Damages and injunction—Specific Relief Act, Ss. 54 and 55.*

Every owner of land has a natural right to so much light and air as pass vertically thereto; such right does not extend to light and air coming laterally over the land of another. In India, this right must be acquired by prescription in the manner provided by S. 15 of the

Easements Act (V of 1882).—(Continued).

Easements Act, which, following the English Law, declare such easements to be absolute (a).

Where the land belongs to Government, and is held by the parties as tenants, then no easement can be acquired by prescription against a tenant, unless and until it is also acquired against Government as reversioner or remainderman (b).

Injunctions are either prohibitory or mandatory. The former puts a stop to something in progress, by forbidding future action; the latter conveys an order to undo that which has been done. The whole law of relief by injunction is a creation of equity, and in England, until the Judicature Act, 1873, was practically exercised only by the Court of Chancery. In India, the granting of injunctions is regulated by Ss. 54 and 55 of the Specific Relief Act. The sections have never been understood as introducing new principles of law into India, but rather as an attempt to express, the rules acted upon by the Courts of Equity in England (c).

The Indian Statute follows English Law in the rule that, with specified exceptions, no easement is affected by any change in the extent of the dominant or servient heritage (d).

In order to give a right of action for obstruction of ancient light, there must be a substantial privation of light, sufficient to render the occupation of the house uncomfortable, or to prevent the plaintiff from carrying on his accustomed business on the premises as beneficially as he had formerly done. This rule of English Law has furnished the model of S. 33 of the Easements Act (e).

Both in India and in England the granting of injunctions is always a matter for the discretion of the Court in every case. Where a discretion has been properly exercised and is supported by valid reason, a Court of appeal will ordinarily refuse to interfere. But where a mandatory injunction is issued, arbitrarily, appellate interference, even in second appeal, is not only justifiable but legally necessary (f).

It lies on a plaintiff, claiming relief for obstruction of easement of light and air to prove the presence of every element necessary to establish his prescriptive acquisition of the easement claimed.

Where a person allows a structure which obstructs his easement of light and air to be completed, the Court may not give a mandatory injunction, in cases where, by granting a mandatory injunction, the injury to the

Easements Act (V of 1882).—(Continued).

defendant will be out of all comparison to the injury to the plaintiff by the obstruction of his easement (g).

It may be stated as a good working rule that (1) if the injury to the plaintiff's legal rights is small (2) and is one which is capable of being estimated in money (3) and which can be compensated adequately by a small money payment (4) and the case is one in which it would be oppressive to the defendant to grant an injunction, then damages in substitution for an injunction may be given. In any instance, in which a case for injunction has been made out, if the plaintiff, by his acts or laches, has disentitled himself to the injunction, the Court may award damages (h).

No easement connected with or appurtenant to the common property of two persons can be acquired by the one over the other. **Behari Lal v. Sheo Lal**, 3 N.L.R. 114.

STANYON, A.J.C.

References:—(a) 2 B. 660, L.R. (1895) 2 Ch. D. 389 (402), 6 B.L.R. 85, R; (b) L.R. (1898), 3 Ch. 48, R; (c) 14 C. 189, R; (d) L.R. 5 Ch. App. 163, 44 L.J. Ch. 625, 11 H.L.C. 290, L.R. 8 Eq. 1, R; (e) L.R. 18 Eq. 544, 2 Car. & P. 465 = 31 B.R. 679, L.R. 2 Ch. D. 578, R; (f) 33 Ch. D. 471, 15 W.R. 387, 5 Ch. 163, 6 Ch. 809, (1902), 1 K.B. 15, 2 Eq. 238, 2 Eq. 425, 1 Ch. 16, 9 Ch. 212, 6 C.D. 160, 32 I.A. 185 = 9 C.W.N. 1073, R; (g) 44 L.J. (N.S.) Ch. 625, L.R.I. Ch. 244, L.R. (1894), 1 Ch. 276, 16 A. 69, 72, 8 B.H.C.O.C. 181, 2 B. 133, R; (h) L.R. 1 Ch. 287, L.R. 26 Ch. D. 578, 13 B. 252, L.R. 18 Eq. 544, 18 B. 474, 20 B. 704, 19 A. 259, 16 M. 407, 31 C. 944, 1 C.M. and R. 211, L.R. 3 Ch. 48, R.

(2-a) S. 15—See No. 2, *supra*.

(3) Ss. 15 and 28 (c)—*Easement—Prescriptive right to light and air—Actual damage.*

Where a plaintiff is claiming relief, upon the ground that his prescriptive right to the passage of light and air to a certain window has been interfered with, it is enough to show that the right has in fact been interfered with. The plaintiff is not obliged to go further and show that he has suffered actual damage thereby. **Kunni Lal v. Kundan Bibi**, A.W.N. (1907), 175 = 4 A.L.J. 477 = 29 A. 571.

AIKMAN, J.

References:—1904, A.C. 179, 1905, 1 Ch. 480, not applied; 8 B. 95, R.

Easements Act (V of 1882).—(Continued).**(4) Ss. 15 and 47—Acquisition of easements—Extinguishment of easement—Period of user.**

The plaintiffs sued for an injunction to restrain the defendants from allowing the rain-water of their house to flow on plaintiff's land. The Court dismissed the suit, on the ground, that the defendant's easement, being discontinued only four years before the suit, was not extinguished under S. 47 of the Indian Easements Act until the lapse of 20 years from its total disuse.

Held, (1) that there was no acquisition of easement under S. 15 of the Easements Act, on the ground, that the period of 20 years must be taken to be a period ending within 2 years next before the institution of the suit, wherein the claim to which the period relates is contested.

(2) that S. 47 of the Easement Act comes into operation only where an easement has been acquired under S. 15 of the Act. **Haji Umarani Kachi v. Ganeshbhat Purnhot-tambhat**, 9 Bom. L.R. 1101.

CHANDAVARKAR and BEAMAN, JJ.

(4-a) S. 16—See No. 2, *supra*.

(4-b) S. 21 (c)—See No. 3, *supra*.

(4-c) S. 39—See No. 2, *supra*.

(4-d) S. 35—See No. 2, *supra*.

(4-e) S. 47—See No. 4, *supra*.

(5) S. 60—Landlord and tenant—Adverse possession—possession of site for over 12 years—License—revocation—House of a permanent character.

The plaintiff was recorded zemindar of Daraganj. The *wajib-ul-arz* provided that the zemindar was entitled to *Dhik* (royalty), in case the house of any tenant was sold. Certain houses were attached and advertised for sale as the property of the defendant-judgment-debtor. The zemindar brought this suit for declaration of his right. It was found that, for 35 years, the judgment-debtor and his predecessors in title, who did not cultivate any land, were in possession of the houses and the site, and had never acknowledged the plaintiff's right, nor had paid him any rent. *Held*, that they acquired a title by prescription in the site as well as the houses, and their rights could be sold.

Per STANLEY C.J.—If a license was granted by the zemindars to the predecessors in title of the judgment-debtor, and they, acting upon

Easements Act (V of 1882).—(Concluded).

that license, built a house, which was of a permanent character, the zemindar could not revoke the license and seek possession of the site. **Bhadder v. Khair-ud-din Hussain**, 8 A.L.J. 760 = A.W.N. (1906), 805 = 29 A. 183.

STANLEY C.J. and RUSTOMJEE, J.

Ejectment.

(1) Notice to quit—Tenant from year to year—Tenant-at-will—See LANDLORD AND TENANT, No. 5, 11 C.W.N. 225.

(2) Right to sue under-tenants in, without previous notice to quit—See SERVICE TENURE, No. 1, 11 C.W.N. 46 = 5 C.L.J. 53.

Election (Municipal.)

(1) Defendant refusing to receive nomination papers—See RIGHT OF SUIT, No. 2, 8 Bom. L.R. 838 = 31 B. 97.

Endorsement.

Authority and time for making—See LIMITATION ACT, No. 35, 4 L.B.R. 1.

Endowment.

(1) Endowment for religious and pious purposes—Applicability of S. 4 of Pensions Act—See ACT XXIII OF 1871 (PENSIONS), No. 4-a, 17 M.L.J. 549.

Enfranchised Inam Act.

See ACT IV of 1866 (MADRAS).

Equity.

(1) Where there is a subsisting charge on certain property paid off by the person in possession, it is equitable that when the plaintiff reclaims the estate credit should be given to that person for the payment of the mortgage which the plaintiff would have had to meet. **Ashidabal v. Abdulla Haji Mahomed**, 8 Bom. L.R. 652 = 31 B. 271.

CHANDAVARKAR, J.

References:—2 I.A. 7, 1898 P.J. 80 and 1894, P.J. 89, F.

(2)—arising on reversioner setting aside alienation by widow—Equity with respect to property received as belonging to another—See HINDU LAW (REVERSIONER), No. 2, 9 Bom. L.R. 710.

(3)—treats as done what ought to have been done—See MORTGAGE (GENERAL), No. 4, 4 A.L.J. 57.

Equity of redemption.

(1)—of usufructuary mortgage is an intangible thing—See *SALE*, No. 2, 3 N. E. R. 72.

Estoppel.

- (1) *Suit or pre-emption—Oudh Laws Act, S. 9, cls. (2) and (3)—Elements necessary to constitute estoppel.*

In a suit for pre-emption under S. 9 of the Oudh Laws Act, the defendant, in order to establish a plea of estoppel, has to prove that the property was offered to the plaintiff at a certain price, and that he expressly consented to the purchase of the property by the defendant vendee; and the Court should not be satisfied with anything short of this.

Some Judges have thought that such a plea should not be allowed at all in a case like this (a). *Bank of Upper India v. Munshi Alop Prasad*, 10 O.C. 257.

CHAMIER and GREEVEN, JJ.

Reference :—(a) 5 O.C. 395. R.

- (2) *Judgment operating as—Mutuality—Issue not raised—Res judicata—Test—Partition—Widow, decree against, when binds reversioners—Stranger managing the conduct of suit, when bound—Shebait, judgment against, binds succeeding shebait—Civ. Pro. Code (XIV of 1882), S. 138, scope of—Document, received and acted upon, effect of—Adverse possession, plea of, taken in Court of appeal—Limitation, statute of, construction—Female trustee—Title extinguishment of, effect of.*

A particular judgment, if obligatory upon either of the parties to the suit, is binding upon both, on the principle that as the merits have been determined and judgment entered thereon in their presence, it is conclusive upon both of them until reversed; it is entirely mutual (a).

Quere.—Whether in the case of equitable estoppels, there may not be exceptions to the rule.

A party will be concluded against his contention, by a former judgment, if he could have used it as a protection, had the judgment been the other way, and a person can claim the benefit of a judgment as an estoppel upon his adversary, if he would have been prejudiced by a contrary decision of the case.

A decision may operate as *res judicata*, although no issue has been expressly raised. The test to be applied is, whether it plainly appears

Estoppel.—(Continued).

that the question so raised by the parties in their pleadings was actually submitted by them to the Court and judgment given on it.

An estoppel is not confined to the judgment but extends to all facts involved in it as necessary steps or ground work upon which it must have been founded (b).

Partition can take place only upon the assumption that both the parties are interested in the subject-matter of the litigation.

Where a decree has been obtained upon a fair trial in a suit by or against a Hindu widow, or daughter or mother, the decree is effectual and operative as against the reversioner, unless the decree can be successfully impeached on special grounds (c).

The mere circumstance that a stranger has promoted litigation or assisted in a suit, does not make him bound by the judgment. The fact that he managed the cause as agent or attorney, or interested himself in it, and aided the plaintiff or defendant, with or without any employment for either party, does not, by itself, preclude him from impeaching the judgment; but where he is so identified in interest with one of the parties, that he might have been a party himself and might have participated in the conduct of the proceedings, and where, as a matter of fact, though not on the record, he has taken a direct interest in the institution and progress of the suit, has actually controlled the proceedings, examined witnesses, and preferred an appeal, he may be estopped by the judgment quite as much as the party on the record (d).

A judgment obtained against a former *shebait* is binding upon succeeding *shebait*s, who, in fact, constitute a continuing representation of the idol's property (e).

S. 138 of the Code of Civil Procedure was enacted to prevent fraud by the tardy production of suspicious documents and not to shut out formal evidence beyond suspicion, such as certified copies of public documents like records of Government or judicial proceedings.

When a document has been received and acted upon in the Court of first instance, a Court of appeal ought to be very slow to interfere with the exercise of discretion by the original Court (f).

When the question reduces to one of law upon facts admitted or proved beyond controversy, it is not only competent to the Court but

Estoppel.—(Continued).

expedient in the interest of justice to entertain the plea of adverse possession; the plaintiff may be allowed to succeed on a title by adverse possession pleaded, for the first time, in the Court of appeal, if such a case arises on the facts stated in the plaint and the defendant is not taken by surprise (*g*).

The effect of a statute of limitation in the absence of legislative provision to the contrary must be determined with reference to the actual state of the title when time begins to run, and when the time has once commenced to run against the absolute owner, on subsequent alteration in the title will postpone the bar.

For all purposes other than succession, a *debutter* estate, during the incumbency of a female trustee, resides in her as fully and effectually as it does in a male trustee, and in such a case, the male trustee who succeeds as reversionary heir, cannot claim the benefit of the principle on which Art. 141 of the Limitation Act is founded.

If the title of the true original owner has been completely extinguished by adverse possession, even if he should reacquire possession, he is not thereby remitted to his original title (*h*). **Lilabati Misra v. Bishun Chobey**, 6 C. L.J. 321.

MOOKERJEE and CASPERSZ, JJ.

References :—(a) 13 C. 352 (356); 15 M. 477; 7 A. 606 (F. B.) (619); 8 A. 324 (332), *R.* (b) 28 M. 338, *R.* (c) 9 M.I.A. 539 (604) = 2 W.R. (P.C.) 31; 11 I.A. 197 = 11 C. 186; 20 I.A. 183 = 21 C. 8; 1 C.L.J. 46 = 27 A. 37; 28 A. 241, *R.* (d) 25 A. 300; 60 Am. Dec. 575, *R.* (e) 2 I.A. 145 (152) = 14 B.L.R. 450 = 23 W.R. 253, *R.* (f) 13 M.I. A. 77 = 12 W.R. 32 (P.C.) *R.* (g) 28 I.A. 81 (88) = 24 M. 387, *R.* (g) 11 B.L.R. 237; 21 A. 204; 1 F and F. 27 = 27 L.J. Ex. 297; 21 W.R. 693 (Eng), *R.*

(3) Representation to person knowing facts, effect of—Admission on point of law, effect of—See **SALE**, No. 2, 3 N.L.R. 72.

(4) Sale in execution—Objection subsequently taken by judgment-debtor that property sold was not legally saleable, validity of—See **Civ. Pro. CODE**, No. 178, A.W.N. (1907), 193.

(5)—by pleading—See **LANDLORD and TENANT**, No. 22, 17 M.L.J. 287.

(6) Suit by puisne mortgagee to redeem prior mortgage—Estoppel by defence raised in previous case—See **MORTGAGE (REDEMPTION)**, No. 22, 10 O.C. 193.

Estoppel.—(Concluded).

(7) The express admission of a party to a suit—Right of party to show that such admissions were mistaken or not true—See **BURDEN OF PROOF**, No. 1, 4 A.L.J. 102.

(8) Alienation of ancestral property by issueless proprietor—Nearest reversioner estopped from questioning alienation—such reversioner's son's right to impeach alienation for want of necessity—See **CUSTOMS (PUNJAB)**, No. 17, 35 P.R. 1907.

(9)—by acquiescence and conduct—Extinction of right of redemption by lapse of time—Suit by mortgagee to be declared owner—See **LIMITATION ACT**, No. 31, 33 P.W.R. 1907.

(10) Suit for rent - Defendants-tenant's plea that the landlord was only a benamidar—See **EVIDENCE ACT (I OF 1872)**, No. 26, 141 P.R. 1906 = 13 P.W.R. 1907.

(11) Prior mortgagee, no party to a suit on a subsequent mortgage—Property advertised as free from encumbrance—Prior mortgagee bidding for it without notifying his claims—See **MORTGAGE (GENERAL)**, No. 24, 4 A.L.J. 709.

(12) Plaintiffs relying on one of two leases in Court of first instance, and on the other in the Court of appeal, whether estopped from relying on the first lease in High Court—See **LEASE**, No. 4, 6 C.L.J. 572.

(13) Application of—Its effect on general law of the land—See **CONTRACT ACT**, No. 2, U.B.R. (1907), Contract, 5.

Evidence.

(1) **Road Cess Act (IX of 1880, B.C.)**, S. 95, applicability of—Document, admissibility of, not objected to in the lower Court—Decree, not inter partes, admissibility of.

The plaintiff, alleging himself to be a *Kashtkar* or holder of a right of occupancy, sued the defendants for the possession of the land, on the ground that they were in occupation without any right. The defendants produced certain rent-receipts showing that the landlords recognised them as *kashikars*. The plaintiff produced a rent decree of 1869 (which contains a statement contrary to that which appears in the receipts) and road-cess returns:

Held, that the road-cess returns are admissible in favour of the plaintiff and their admissibility is not affected by S. 95 of the Road Cess Act. S. 95 of the Road Cess Act has no

Evidence.—(Continued).

application to the case where the parties, who tendered road-pass returns in evidence, were not the persons who filed them, in pursuance of the provisions of the Act.

The decree, though not *inter partes*, is evidence to show that the landlords recognised the plaintiff as *kashikar*, and that the rent receipts granted to the defendants were fraudulent. When no objection was taken as to the admissibility of a document in the Court of first instance, it is not allowable to take the objection in appeal. **Ram Prasad Roy v. Lala Sham Narain**, 6 C.L.J. 22.

MACLEAN, C.J., and HOLMWOOD, J.

- (2) *Proof of date of birth after lapse of years—Reasonable conviction—Pleading—Decision of appellate Court on suggestion as to matter of fact by pleader—Propriety.*

In India, it is difficult to prove such facts as the date of birth, after the lapse of many years, and it would be unreasonable to demand such a class of evidence as would justly be demanded in England. But the evidence must be such as to carry reasonable conviction to the mind.

Where an appellate Court reversed the decision of the lower Court, on the basis of a suggestion on a matter of fact made for the first time by the appellant's pleader, but as to which no evidence had been taken,

held, by the Judicial Committee, that it is very dangerous to adopt a conclusion in a Court of Appeal, merely on the suggestion of a legal gentleman representing one of the parties. **Nawab Shah Ara Begam v. Nanhi Begam**, 11 C.W.N. 130 (P.C.) = 1 M.L.T. 429 = 5 C.L.J. 4 = 9 Bom. L. R. 80 = 17 M.L.J. 32 = 29 A. 29.

LORD MACNAGHTEN, LORD ATKINSON, SIR ARTHUR WILSON and SIR ALFRED WALLIS, JJ.

- (3) *Practice—Court of appeal—Evidence of witnesses—finding of first Court on evidence should not be disturbed on appeal, except on ground of omission to appreciate some evidence—Witness—Appreciation of—Registration Act (III of 1877), S. 17—Documents which are compulsorily registrable not registered—Evidence for collateral purposes.*

Where a Court of first instance has, upon the evidence of witnesses examined before it, come to a conclusion of fact, the Court of appeal ought not to disturb that finding, unless it is satisfied that the lower Court had either omitted to consider material evidence or some cardinal

Evidence.—(Continued).

fact, or had given undue weight to some evidence or fact, which is of little or no importance.

A document, of which registration is compulsory under the Registration Act, 1877, may be used as evidence for any collateral purpose—for any purpose other than that of creating or extinguishing a right to immoveable property.

To disbelieve a witness, because his evidence tells in favour of the party, who has called and examined him and against the adverse party, is to beg the question in dispute. **Bai Gulabhai v. Shri Datgarji Mohangarji**, 9 Bom. L.R. 393.

CHANDAVARKAR and PRATT, JJ.

References:—(1876) L.R.Sc. H.L. 53, 18 C.23 3 B. 159, 12 I.A. 83.

- (4) *Compulsorily registered mortgage-deed—Subsequent registered receipt for further advance and admitting consideration of the mortgage-deed—Onus probandi of non-receipt of the consideration.*

On 5th April, 1896, A executed a mortgage-deed of Rs. 4,250 in favour of H. On 19th October, 1896, it was compulsorily registered by the Registrar. One of its stipulations was that H could not sue for his money for six years.

A gave notice that he would waive the condition of six years and that H could sue at once. H replied that A could go to Court, if he liked, to which A retorted that he owed no money to H.

In 1898, a reconciliation was effected and A took Rs. 250 more from H and executed a registered receipt, containing a full and categorical admission of the receipt of Rs. 4,250, previously, and Rs. 250 at the time of writing.

Held, that, under the above circumstances, the onus of proving that A did not receive any money lay very heavily upon him and as he failed to discharge the onus, H was entitled to succeed in his claim. **Hafiz Hamid Yar Khan v. Hafiz Alla Bakhsh Khan**, 8 P.W.R. 1907.

ROBERTSON, J.

- (5) *Practice—Objection to the admissibility of a document taken before the Privy Council but not taken at the trial—Certified copy of an old document—Its admissibility in evidence.*

Where a document was received in evidence without any objection at the trial, their Lordships were of opinion that it was too late to take an objection to its admissibility before them.

Evidence.—(Continued).

A certified copy of an *ewaznama*, or deed of exchange, dated January 1782, produced from the custody of one of the appellants, and found to be written on paper bearing the same stamp and water-mark as other contemporary documents in the record of certain litigation, was held admissible in evidence. **Shahzadi Begam v. The Secretary of State for India**, 9 Bom. L.R. 1192 (P.C.)=6 C.L.J. 678=34 C. 1059=2 M.L.T. 489.

LORD ROBERTSON, LORD COLLINS and SIR ARTHUR WILSON, JJ.

(5-a) *Thiruppuvaram*—receipt and payment of, at reduced rate for 11 years—Estoppel—Judicial acts done in one day—presumption that they were simultaneously done.

Where, at the settlement, on the Sirkar reducing a *Thiruppuvaram* due from the plaintiff lands to two Mattoms from 30 Parahs and odd to 11 Parahs and odd, the plaintiff, one of the two mattoms that received the lower rate for 11 years from the defendant, claimed *Thiruppuvaram* at the higher rate, *held*,

that as the plaintiff, by accepting the lower rate of *Thiruppuvaram* for 11 years from the defendant, showed an intention by his conduct, and induced the defendant to believe, that he would not claim the higher rate from the defendant or the lands in the enjoyment of the defendant (although probably the plaintiff reserved his remedies against the Sirkar), and as the defendant was thereby prejudiced in that he was barred by limitation from seeking his remedies against the Sirkar to whom he is now obliged to pay 22 Parahs and odd, though the Sirkar is entitled to nothing from him or his lands, the plaintiff was estopped from claiming the higher rate, as it was impossible to believe that he, receiving for 11 years exactly at the settlement rate, did not know that the defendant was denying his title to receive the higher rate (a).

The presumption of law is that "a thing or state of things, which has been shown to be in existence" for a long time and within a reasonable period before suit, continued to exist till the suit was brought. The defendant's assertion of a right to be free from payment of more than 11 Parahs and odd to the plaintiff continued, therefore, for more than 12 years before suit (b).

It being contended that the lower appellate Court ought not to have re-admitted the plain-

Evidence.—(Continued).

tiff's appeal, dismissed for default, without a written application from him stating the grounds for his non-appearance, *held*,

it was a mere irregularity; a term of "assizes" is considered, in England, as one legal day; all judicial acts, done in one day, are considered as having been done at the earliest moment of the day and simultaneously (c). **Bhagvati Pillai Perumal Pillai v. Kiranthitta Sasthra Dasa Govinda Brahmanande Tirthur**, 22 T.L.R. 8.

SDASIVA IYER C. J. and EAPEN J.

References:—(a) 16 T.L.R. 172, R; (b) 16 T.L.R. 172, *Expl.* (c) 9 M. 132, R; 16 T.L.R. 45, R.

(6) Pre-emptor not intending to retain property after securing it—Right to pre-empt—Instances in neighbouring sub-divisions when relevant—See CUSTOMS (PUNJAB), Nos. 22 and 59, 38 and 39, P.W.R. 1907.

(7) Admissibility of unregistered agreement to give lease in, in suit for specific performance—See REGISTRATION ACT, No. 15, 17 M.L.J. 218.

(8) Recording, in English in ejectment suit—Irregularity—See LANDLORD AND TENANT, No. 12, 34 C. 896.

(9) Admissibility of impounded instrument in—on payment of penalty—Court bound to accept the instrument—See STAMP ACT, No. 7, 9 Bom. L.R. 122.

(10) Entries in register of inventions—Public documents—Burden of proof in suit for infringement of patents. See ACT V of 1888 (INVENTIONS AND DESIGNS), No. 1, 4 A.L.J. 11.

(11) Counsel, charge of professional misconduct against—Evidence to prove the charge—See EVIDENCE ACT, No. 27, 9 Bom. L.R. 3.

(12) Application for review on the ground of discovery of new evidence—Rejection by Court—Application for admission of some evidence in appeal—Jurisdiction of Appellate Court to take further evidence—Local investigation by Appellate Court—See CIV. PROC. CODE, No. 289, 11 C.W.N. 721.

(13) Appeal against order refusing to issue commission for examining witnesses—See LETTERS PATENT (MADRAS), No. 2, 30 M. 148.

(14) Corroborative, of statements not challenged by other party—See SPECIFIC PERFORMANCE, No. 1, 11 C.W.N. 946. (P.C.).

Evidence.—(Concluded).

(15) Unstamped instrument, admissibility of—Secondary—See **STAMP ACT** (II OF 1899), No. 6, 17 M.L.J. 908.

(16) Counsel giving evidence on behalf of clients of matters known to him before employment—Court—Practice—See **COUNSEL**, No. 2, 9 Bom. L.R. 1044.

(17) Judge's notes of Counsel's address as evidence of such address—See **COUNSEL**, No. 1, 9 Bom. L.R. 1042.

(18) Evidence equally balanced on both sides—Oath proposed by other party—Refusal—Its effect—See **OATH**, No. 1, 2 M.L.T. 327.

(19) Unregistered mortgage-deed—Evidentiary value of—See **REGISTRATION ACT**, No. 14, 4 L.B.R. 52.

(20) Lease and counterpart—Neither complete in itself, but each supplementing the other—Evidentiary value—See **LEASE**, No. 4, 6 C.L.J. 572.

(21) Custom of inheritance among Parivars mixed—Evidence as to custom among caste people generally in district valuable—need not be confined to village in dispute—See **HINDU LAW (INHERITANCE)**, No. 4-a, 22 T.L.R. 13.

(22) Award of arbitrators inadmissible for want of registration—secondary evidence of award, whether admissible—See **REGISTRATION ACT** (III OF 1877), No. 3-a, 71 P.R. 1906=111 P.L.R. 1907.

Evidence Act (I of 1872).

(1) Proof of custom—Value of confessions of Judgment and admissions—See **CUSTOMS PUNJAB**, No. 12, 26 P.R. 1907.

(2) S. 4—Record of plaintiff's name as a co-sharer—Presumption—See **ACT II OF 1901 (AGRA TENANCY)**, No. 20, A.W.N (1906), 316=4 A.L.J. 3.

(3) *Ss. 11 and 13—Recitals in documents if and when admissible, against persons not parties to the deeds.*

Per RAMPINI, J.—Documents, for instance, a deed of sale and a mortgage deed, as in this case, though not *inter partes*, containing recitals that a particular land belongs to a particular *howla*, which is in question, are admissible in evidence under either S. 11 (b) or 13 of the Act, although they are not conclusive or binding evidence and may be very weak evidence or even of no weight at all (a).

Per GEIDT, J.—Documents containing recitals that a particular plot of land is included within a particular *howla*, though not *inter partes*, are

Evidence Act (I of 1872).—(Continued).

admissible in evidence under S. 13 of the Act, as transactions by which the right to hold the land as part of the *howla* is recognised, and particularly when the existence of that right is a question raised in the case and is a relevant fact. **Dwarka Nath Bakshi v. Mukundu Lal Chowdhury**, 5 C.L.J. 55.

RAMPINI and GEIDT, JJ.

References.—(a) 16 M. 194, 23 W.R. 293 and 25 C. 522, R.

(4) *Ss. 11, 13 and 43*—Suit for malicious prosecution—Judgment of, and evidence before, the Magistrate in the prosecution, how far relevant—See **MALICIOUS PROSECUTION**, No. 1, 9 Bom. L.R. 1134.

(5) *Ss. 11 and 32—Relevant facts—Statements by persons who cannot be found or called as witnesses.*

As a general rule S. 11 of Evidence Act is controlled by S. 32 of the Act, where the evidence consists of statements of persons who are dead or who cannot be found: but this rule is subject to certain exceptions.

S. 32 imposes restrictions upon the admissibility of statements made by persons who cannot be brought before the Court to give their own evidence. The whole scope and object of the section centres upon securing the highest decree of truth possible in the circumstances for the statement. It follows, that, where the person tendering such a statement is indifferent as to its truth or falsehood, there is nothing to bring that section into play.

The test, whether the statement of a person who is dead or who cannot be found is relevant under S. 11 and admissible under that section, (presuming that it is in other respects within the intention of the section), although it would not be admissible under S. 32, is this: It is admissible under S. 11 when it is altogether immaterial whether what the dead man said was true or false, but highly material that he did say it. In these circumstances, no amount of cross-examination could alter the fact if it be a fact, that he did say the thing, and if nothing more is needed to bring the thing said in under S. 11, then the case is outside S. 32. **R. D. Sethna v. Mirza Mahomed Shirazi**, 9 Bom. L.R. 1047.

BEAMAN, J.

(6) S. 13—Admissibility of previous judgment as regards the ownership of waste land—See **ACT VIII OF 1865 (MADRAS RENT RECOVERY)**, No. 8, 17 M.L.J. 518=2 M.L.T. 455.

Evidence Act (I of 1872).—(Continued).

(6-a) S. 13—See Nos. 3 and 4, *supra*.

(7) Ss. 13 (a), and 32 (7)—Document, statement in—Admissibility against person not a party to it—Statement of deceased person—right or custom, evidence of—Nakdi or bhaoli rent.

To prove or disprove a right or custom, it is not enough to adduce evidence of a transaction, in which, or in the course of which, the right or custom was asserted or denied. The transaction will be relevant under S. 13, cl. (a) of the Evidence Act, if it be one by which the right or custom was asserted or denied. When the question was whether a tenant held lands under the *nakdi* or *bhaoli* system of rent, and the Court based its decision on a statement contained in a *hebanama* executed by the deceased grandfather of the tenant,

held that the *hebanama* was not admissible in evidence under S. 32 (7), read with S. 13, cl. (a) of the Evidence Act. **Bansi Singh v. Mir Amir Ali**, 11 C.W.N. 703.

GEIDT, J.

(8) Ss. 13 and 43—Judgment not inter parties—Admissibility of the judgment in subsequent proceedings—Particular instances in which the right was claimed—See CIV. PRO. CODE, No. 25, 9 Bom. L.R. 65.

(8-a) S. 32—See No. 5, *supra*.

(8-b) S. 32 (7)—See No. 7, *supra*.

(9) S. 36—Topographical Survey map—Admissibility in evidence—Value as evidence—Presumption that entries are correct—Boundary dispute—Jungle land—Duty of Court to settle boundary, when evidence insufficient—Second appeal—Civ. Pro. Code (Act XIV of 1882), S. 584—Error of law.

When the question was in which of two adjoining villages—the boundary line between which admittedly corresponded with the boundary line between two *pergunnahs*—the land in dispute was included,

held, that a Topographical Survey map of 1869, in which the boundary line between the two *pergunnahs* was given, was admissible in evidence under S. 36 of the Evidence Act.

When *pergunnah* boundaries are found entered in such map, the presumption is that they were so entered in pursuance of instructions received.

S. 36 of the Evidence Act does not require that the authority, under which a map is prepared, must be authority given by statute.

Evidence Act (I of 1872).—(Continued).

Assuming that topographical survey maps were not prepared for revenue purposes, they are official documents prepared by competent persons, and with such publicity and notice to persons interested, as to be admissible and valuable evidence of the state of things, at the time they were made. They are not conclusive and may be shown to be wrong, but in the absence of evidence to the contrary, they may be properly judicially received in evidence as correct when made (a).

In cases of boundary disputes, the fact that no satisfactory evidence as to possession is obtainable, does not relieve the Court of the duty of settling the boundary line on the evidence before it (b).

Held, on second appeal, that, in the absence of better evidence, the lower Appellate Court erred in law in not accepting a Topographical Survey map as evidence of possession at the time the map was made. **Gajhoo Damor Singh v. Kotwor Jagatpal Singh**, 11 C.W.N. 290.

BRETT and GUPTA, JJ.

References:—(a) 7 C.W.N. 193=80 C. 291, R. (b) 21 C. 504, F.

(9-a) S. 43—See Nos. 4 and 8 *supra*.

(10) Ss. 58 and 91—Distinction between evidentiary admissions and admissions by pleadings—Admission by pleading not excluded by S. 91—See SALE, No. 1, U.B.R. (1907), Evidence, 1.

(11) S. 65, cl. (e) and cl. (g)—Evidence of record-keeper and clerks as to general result of their examination of records—Admissibility—See CIV. PRO. CODE, No. 36, 11 C.W.N. 501.

(12) S. 68—Attesting witness to mortgage document not called—Admissibility of document in evidence to enforce personal covenant.

Where an attesting witness is necessary to the validity of an instrument, a person who was such witness must be called, if available, whatever be the purpose for which the instrument is produced. So, where a person omitted to take proper steps to cause the attendance of the only available attesting witness to the mortgage-deed on which he sued, and the lower Courts admitted the document in evidence, for the purpose of enforcing the personal covenant in the bond, held that the section prohibits the proof of execution of the document otherwise than by the evidence of an attesting witness, and that it is impossible to view the question of the execution with reference to the covenant to pay, as severable from the execution of the document, in so far as it creates the security.

Evidence Act (I of 1872).—(Continued).

Where the requisite attestation is wanting, that involves a question exclusively as to the validity of the transaction; whereas, where an attesting witness, who ought to have been called, has not been called, that raises a question exclusively as to proof and admissibility.

Yeerappa Kavendan v. Chinnamuthu Ramasawmy Kavendan, 2 M.L.T. 175=17 M.L.J. 218=80 M. 251.

SUBRAHMANIA AIYAR and MILLER, JJ.

References:—4 Esp. 241, 1 Leach Cr. C. 174 R.; 18 M. 29, D.

(13) S. 91—Admissibility of oral evidence of terms of compromise under S. 375, C.P.C.—See Civ. Pro. Code, No. 215, 3 L.B.R. 243.

(13-a) S. 91—See No. 10, *supra*.

(14) Ss. 91, 95 and 97—*Demonstratio falsæ non nocet*—Misdescription of survey number in sale-deed—Misdescription of premises.

The general rule laid down in S. 91 of the Act is, that, when the terms of a contract have been reduced to writing, no evidence shall be given in proof of the terms of the contract except the document itself, or, in certain cases, secondary evidence of its contents. But this rule is subject to the important exceptions contained in Ss. 95 and 97. Where land with certain boundaries is sold and is wrongly described as containing a certain area, the error is regarded as a mere misdescription and does not vitiate the deed. The maxim *demonstratio falsæ non nocet* applies.

Where, in a sale-deed, the land sold is sufficiently identified by the description of its extent and assessment and the name of the registered pattadar, the addition of a wrong survey number may be disregarded and does not render it useless as a document of title (a).
Karuppa Gounden v. Periatthambi Gounden, 2 M.L.T. 336=80 M. 397.

BENSON and BODDAM JJ.

Reference:—(a) 4 Bom L.R. 871, R.

(15) S. 92—Property exchanged—Payment of cash recited in sale-deed—Whether evidence could be offered to prove actual transaction.

Evidence is admissible to show that consideration, mentioned in a deed as having been paid, never passed, and also to show that the consideration specified in the deed was satisfied in a different way from that mentioned in the document itself (a).

Evidence Act (I of 1872).—(Continued).

Where, therefore, a deed recited that a payment of Rs. 1,000 was made in cash, held that it could be shown that the payment was not made in cash, but in some other way. **Muhammad Yusuf v. Muhammad Musa**, 4 A.L.J. 441=A.W.N. (1907) 181.

STANLEY, C.J. and BURKITT, J.

References:—(a) 18 A. 168; 22 A. 370 (P.C.), R.

(16) S. 92—Admissibility of evidence to vary or contradict terms of document—Evidence of acts and conduct of parties—Relaxing Indian Statute Law by applying principles of equity.

The law in India generally is a codified law and, so far as the adjective law is concerned, the Codes are exhaustive, not only as to the rules to be followed, but also as to the extent of discretion vested in the Courts. There is little analogy between the *status* of this codified law and the position occupied by the common law of England; and Courts in India are not justified in relaxing or avoiding the Statute Law in the same way, as Courts of Equity in England deal with rules of common law.

The effect of S. 92 is to exclude evidence of every kind adduced to prove an oral agreement, of which proof is forbidden by the section, including the circumstantial evidence derived from the acts and conduct of the parties to the instrument in question. When an oral agreement of mortgage is put forward, whether it be to wholly supplant or merely to supplement the terms of a written sale, clearly there is a contradiction of, or an addition to, the written evidence of the transaction, and that is sufficient to bring S. 92 into operation. The word "contradict" in that section must be given its ordinary meaning; and, therefore, the distinction drawn by Messrs. Amir Ali and Woodroffe, viz., that we cannot vary, add to, or subtract from, the written evidence of the terms of a transaction, but we may wholly contradict it, by proof of an entirely different contemporaneous oral agreement, is not sound. **Gujarmal Ramlal v. Sitaram Arjun**, 3 N.L.R. 19.

STANTON, J. C.

References:—22 A. 149 and 30 C. 738, R. 4 B. 594, 16 M. 80, 25 C. 603, 28 C. 256, 28 C. 289. Diss.; 25 M. 7, F.

(17) S. 92—Collateral agreement as to interest on a *Hundi*, admissibility of evidence as to, under—See ACT XXVI of 1881 (NEGOTIABLE

Evidence Act (I of 1872).—(Continued).

INSTRUMENTS), No. 3, 11 C.W.N. 105=4 A.L.J. 29=1 M.L.T. 427=5 C.L.J. 7=9 Bom. L.R. 1=17 M.L.J. 85, (P.C.).

(18) S. 92, Proviso 2—Rate of interest—Hundis silent as to interest—Collateral contemporaneous agreement fixing rate—See ACT XXVI OF 1881 (NEGOTIABLE INSTRUMENTS), No. 3, 11 C.W.N. 105 (P.C.).

(19) S. 92, Prov. 2—Pro-note silent as to interest—Presumption—Oral evidence of contemporaneous agreement to pay interest—See Act XXVI of 1881 (NEGOTIABLE INSTRUMENTS), No. 4, 17 M.L.J. 296.

(20) S. 92, proviso IV—Agreement for maintenance under registered deed—Admissibility of oral evidence for modification of such agreement.

Suit by step-mother against the step-son, to recover arrears of maintenance under registered deed, executed by the latter in favour of the former. The defendant pleaded that, having been unable to pay maintenance at the stipulated rate, he had come to an oral settlement with her, under which he gave her possession of certain land, to be enjoyed for her lifetime and that she had accordingly been in such enjoyment. *Held*, that the settlement pleaded is an agreement to rescind or modify the original agreement, within the fourth proviso to S. 92, and, as such, is inadmissible in evidence, and that she is entitled to future maintenance, at the rate stipulated in the original agreement. Although the defendant cannot prove the agreement to discharge the claim for maintenance in the manner alleged, he may yet prove that the arrears have been in fact discharged in that manner, by the plaintiff's enjoyment of the lands. **Kaltika Bapanamma v. Kistamma**, 17 M.L.J. 30.=30 M. 931.

BENSON and WALLIS, JJ.

References:—26 M. 195, 27 M. 368, F.

(20-a) S. 95—See No. 14, *supra*.

(20-b) S. 97—See No. 14, *supra*.

(21) S. 106—Wife holding benami for husband—Onus of proof—See BENAMI TRANSACTIONS, No. 1, 17 M.L.J. 339.

(22) S. 108—Presumption as to death—Person not heard of for seven years—Time as to when presumption arises—Onus.

S. 108 of the Evidence Act makes provision for the question whether a man is alive or dead, that is, whether he is alive or dead when the question is raised, and not whether he was

Evidence Act (I of 1872).—(Continued).

alive or dead at some antecedent date; the law raises no presumption as to the time of his death, and the presumption that may, in certain circumstances, be raised, is a presumption that the man is dead when the question is raised, and not a presumption that he was dead at some antecedent date.

It is on the person, who alleges that the person was dead at antecedent time, to prove that fact by evidence. **Fani Bhushan Banerjee v. Surja Kanta Roy Chowdhury**, 5 C.L.J. 649=11 C.W.N. 883.

MACLEAN, C. J., and GEIDT, J.

(23) S. 111, applies to question of good faith arising under S. 96, Trusts Act—See TRUSTS ACT, No. 3, 9 Bom. L.R. 606.

(24) S. 112—Legitimacy of children—Child born during continuance of valid marriage—Presumption of legitimacy.

Under S. 112 of the Act, there is a conclusive presumption that a child born during the continuance of a valid marriage is a legitimate issue of the parents, no matter how soon the birth be after the marriage. **Umra v. Muhammad Hayat**, 79 P.R. 1907.

KENSINGTON and LAL CHAND, JJ.

(25) S. 115—Estoppel—Pre-emption—waiver of right—withdrawal of money.

When vendors left certain money with vendees for payment to a creditor, the plaintiff, a co-sharer in the village, who withdrew the money and brought a suit to pre-empt the property, *held*, that the withdrawal of money could not operate as a waiver of pre-emptive right. The plaintiff by taking the money did not acquiesce in the sale (a).

When the principles of the law of estoppel, by which the Courts in India are to be governed, are found in S. 115 of the Act, there is no need to fall back upon the analogies of the Mahomedan Law in a case of pre-emption arising between the Hindus (b). **Ajudhia Chaudhari v. Chhatarpal Lal**, 4 A.L.J. 210=A.W.N. (1907), 88.

KNOX, J.

References:—(a) 2 A.L.J. 145 and 9 A. 234, R. (b) 5 A. 197, R.

(26) S. 116—Suit for rent—Defendant tenant's plea that the landlord was only a benamidar—Estoppel.

In a suit for rent, instituted by the person, in whose favour a tenant has executed a lease,

Evidence Act (I of 1872).—(Continued).

the tenant is estopped by S. 116 from raising a plea that the ostensible landlord was only a *benamidar* for somebody else. The question of a lessor's title is wholly foreign to a suit of this nature. **Bogar v. Karam Sing**, 141 P.R. 1906 = 13 P.W.R. 1907.

RATTIGAN, J.

References :—7 B.L.R. 723, F. 7 B.L.R. 720, 24 W.R. 44, *Diss.*

(26-a) S. 155 (3)—See No. 27, *infra*.

(27) *Ss. 157 and 155 (3)—Counsel—Charge of professional misconduct—Evidence to prove the charge—Judge of fact can in a proper case have regard to probabilities.*

The appellant was engaged as junior counsel with another advocate (Mr. Eddis), to conduct the prosecution of certain persons charged with a crime, before the Chief Court of Lower Burma. After the trial had ended, the appellant was called upon by an order of the Court, to show cause why he should not be dismissed or suspended from his office as advocate of the Court, in the event of the following charge being found to be true. The charge ran as follows:—

“That you...when you were acting as one of the advocates for the prosecution, suggested or hinted to the said Maung Ohn Ghine that he should influence or attempt to influence Mr. Hardless, a professing expert in hand-writing, by improper means, in order that Mr. Hardless might be induced to express opinions favourable to the prosecution's case, in connection with certain letters produced during the course of the said case, and you were thereby guilty of gross professional misconduct.”

In support of this charge, Mr. Eddis was examined as a witness. He was corroborated by three persons, who severally stated that Mr. Eddis had on the same day repeated to them his impression of the effect of his conversation with the appellant.

Held, that this evidence was admissible under S. 157 of the Act, as it tended to support his credibility.

Mr. Eddis, in answer to questions from the Chief Judge, stated the particulars of interviews he had with Ohn Ghine in the absence of the appellant, and repeated the statements then made to him by Ohn Ghine. Then the Government Advocate went into the witness-box and stated the particulars of a long conversation between Ohn Ghine and himself.

Evidence Act (I of 1872).—(Concluded).

This evidence was used as against the appellant by the Chief Court:—

Held, that the evidence given by Mr. Eddis and by the Government Advocate was inadmissible for the purpose for which it was used or as against the appellant. It might prove that Ohn Ghine was an unreliable witness, but it would not be evidence against a third person.

Held, also, that, in a case of this kind, it was permissible for Judges of fact to consider the probabilities.

Their Lordships, on consideration of the whole case, reversed the order passed by the Chief Court of Lower Burma, whereby the appellant was dismissed from his office as an Advocate of that Court. **Bomonji Cowanjee v. The Chief Judge, &c. of the Chief Court, Lower Burma**, 9 Bom. L.R. 3 (P.C.) = 34 C. 129 = 5 C.L.J. 123 = 11 C.W.N. 370 = 17 M.L.J. 67 = 2 M.L.T. 96 = 5 Cr. L.J. 50 = 4 L.B.R. 27.

LORD DAVEY, LORD ROBERTSON, SIR ANDREW SCOBLE and SIR ARTHUR WILSON, JJ.

(28) *Ss. 157, 159 and 160—Admissibility of ‘pyatpaing’ in evidence—Transaction whether sale or mortgage—Burden of proof—Mutation of names in revenue register.*

Where the question is whether a transaction is a sale or a mortgage, and a person sues to redeem the property on the ground that the transaction is only a mortgage, but the defendant contends that it is a sale, the burden of proof rests on the defendant to prove the sale, at any rate, in the first instance. If mutation of names has taken place, the *pyatpaing* or outer foil of the revenue register of mutations, if not signed by the owner of the land, is not admissible in evidence to prove the report of the transaction made to the headman or surveyor, who maintains the register (a). But if such officer is called as a witness and gives evidence of the terms of the report from his own memory, then such *pyatpaing* is admissible in order to corroborate his testimony under S. 157. The *pyatpaings* must often be of considerable use also under Ss. 159 and 160 of the Act. **Shwe Pan v. Maung Po**, 3 L.B.R. 250.

HARTNOLL, J.

References :—3 L.B.R. 5, R; (a) 1 L.B.R. 260, R.

(29) S. 159—See No. 28, *supra*.

(30) S. 160—See No. 28, *supra*.

Exchange.

(1)—of holdings among tenants—Alteration in the area of holdings—Road cess return—See ACT IX OF 1880 (ROAD AND PUBLIC WORKS CESS, BENGAL), No. 1, 11 C. W. N. 211.

Execution of Decree.

- (1) *Decree on appeal—Original decree modified—Civ. Pro. Code, S. 230—Limitation.*

Where the appellate Court modifies the original decree, it is the decree of the appellate Court that can be executed; and limitation runs from the date of the appellate decree.

So the period of twelve years, prescribed by S. 230 of the Civ. Pro. Code, must be counted from the date of the decree passed on appeal.

Mahomed Mehdi Bella v. Mohini Kanta Saha Chowdhry, 34 C. 874.

RAMPINI, AG. C. J. and SHARFUDDIN, J.

Reference:—25 C. 594, F.

- (2) *Declaratory decree, whether and when executable.*

Held (agreeing with Boddam, J., and dissenting from Michell, J.), that a decree, which declared *inter alia* that the plaintiff, an archaka of a temple, was entitled, as such, to have the key of the temple for the performance of the duties of archaka of the temple, was intended to be imperative, and that execution should be issued, so as to give the plaintiff such possession as he was entitled to under the decree. **Ratna Moodalliar v. Krishna Bhattar**, 17 M.L.J. 423 (F.B.).

SHEPARD, SUBRAHMANIA AIYAR and DAVIES, JJ.

- (3) *Decree by first appellate Court, limitation for execution of, starting point of, in case of withdrawal of second appeal, date of final order or decree of the appellate Court.*

Application for execution of the decree of a first appellate Court, more than three years from its date, but within three years of the date of an order of the second appellate Court, dismissing the second appeal, as the result of an application for withdrawal of the second appeal. *Held*, time began to run from the date of the order dismissing the second appeal, such order being the one finally disposing of the second appeal, and not from the date of the decree of the first appellate Court. **Sadagopa Ramanuja Periya Jeayangar v.**

Execution of Decree.—(Continued).

Lakshmi Doss, 1 M.L.T. 233 = 16 M.L.J. 333 = 30 M. 1.

WHITE, C.J., and SUBRAHMANIA AIYAR and BENSON, JJ.

References:—9 C. 100, Appr. and F., and 22 B. 506, not F.

- (4) *Purchaser of a portion of the property charged with the payment of a decree, rights of—Liability of other properties charged, when a portion of the property sold subject to the entire charge—Proclamation of sale, entries in, effect of—Question to be decided in each case, what the Court executing the decree intended to sell.*

The appellant, having purchased a decree obtained by one A. H. under which it was declared that the amount found due was to be a charge upon several properties, tried to execute it against some of the properties charged with the payment of the decree. He had also purchased one of such properties in execution of a decree held by a third person. At the time of sale, it was notified that the property to be sold was subject to the charge created by the decree in favour of A. H. The appellant exempted the property purchased by him and sought to recover the amount of his charge created by the decree in favour of A. H. by sale of the rest of the property. The application was resisted on the ground, that, inasmuch as the appellant was, as representative of A. H., the decree-holder and also the judgment-debtor as purchaser of part of the property subject to the charge created by the decree in favour of A. H., the application for execution could not proceed; and that inasmuch as the decree in favour of A. H., had been entered in the proclamation of sale as a charge upon the property purchased by the appellant, and the proclamation did not disclose the fact that several other properties were charged along with the property to be sold, the appellant must be taken to have purchased on the understanding that the property purchased by him was subject to the entire charge.

Held that the appellant, being interested in a small portion only of the property subject to the charge created by the decree in favour of A. H., was entitled to proceed against the properties charged, other than the one purchased by him, for so much as he may be entitled to recover from such of the properties.

Execution of Decree.—(Continued).

Held, also, that the property purchased by the appellant could not be considered to have been sold subject to the entire charge created by the decree in favour of *A. H.*, and that there was no justification for holding that the other properties charged with the payment of the decree in favour of *A. H.*, had been released from their liability. **Abdul Wahid Khan v. Nawab Baqar Ali Khan**, 10 O.C. 280.

CHAMIER, J.C.

References :—27 A. 97, 7 C. 648, 4 O. C. 34, *R.*

- (5) *Application for—Benamidar, application for execution made by—Application made in accordance with law—Limitation Act, 1877, Sch. ii, Art. 179.*

Held, that an application for execution made by a *benamidar* is a good application made in accordance with law and saves limitation. **Abdul Wahid Khan v. Nawab Baqar Ali Khan**, 10 O.C. 268.

CHAMIER, J.C. and GREENAN, A. J. C.

References :—4 B.L.R. App. 40, 5 C.L.R. 253, 9 C. 633, 16 C. 355, 19 W.R. 255, 20 C. 388, 16 A. 483, 2 M.L.T. 93, 21 A. 380, 30 C. 265, 18 A. 69, 28 A. 44, 22 B. 672, 22 Bom. 820, 21 M. 30, 15 M. 267, 21 M. 388, *R.*

- (6) *Deceased widow inheriting a part and buying the other part from another heir who subsequently obtained a decree against the estate of the deceased—Right to execute the decree against the part so purchased—Res judicata.*

I died leaving a widow and other heirs. The widow succeeded to a quarter and purchased a quarter of her husband's property. A decree was then passed against the widow for the debts of her husband for which the assets were to be liable. The decree-holder attached the share purchased by the widow. She died without making any objection. *Held*, that her heirs could raise the objection that that share was not liable to sale, and that the not raising of the objection by the widow did not preclude her heirs from raising the same objection. The matter had not been the subject of a decision and was not barred as *res judicata*, although the judgment-debtor was bound to resist execution on all possible grounds. **Muhammad Ismail v. Wasir Ali**, 4 A.L.J. 400 = A.W.N. (1907) 163.

KNOX and RICHARDS, JJ.

- (7) *Plaintiff obtaining decree for part of his claim—Appeal as regards part dismissed—*

Execution of Decree.—(Continued).

Execution of decree—Right to prosecute appeal.

A plaintiff, who has obtained a decree for part of his claim and has appealed as regards the part dismissed, is not debarred from prosecuting the appeal because he has begun to execute the said decree. **Raghu Mal v. Bandu**, 31 P.R. 1907. (F.B.) = 64 P.W.R. 1907.

REID, JOHNSTONE and RATTIGAN, JJ.

Reference :—82 P.R. 1868, overruled.

- (8) *Sale in execution—Purchase of share in property to some extent incumbered—Presumption—Civil Procedure Code, S. 318—Act No. XV of 1877 (Indian Limitation Act), sch. II, art. 138—Suit for possession.*

Where, in execution of a simple money decree, an undivided share in immovable property, part of which was subject to mortgages, was sold, it was *held* that, in the absence of specific indications to the contrary, it must be presumed that the share sold was, as far as might be, the share which was not incumbered.

Held, also, that the fact that an application, under S. 318 of the Code, made by an auction-purchaser, has been rejected as made beyond time, is no bar to a suit for possession of the property purchased. **Shoo Narain v. Nur Muhammad**, A.W.N. (1907), 191 = 4 A.L.J. 484 = 29 A. 463.

AIKMAN, J.

References :—9 C. 602, 14 C. 644, *F.*

- (9) *Bona fide purchaser from the auction purchaser, himself a party to the suit—Reversal of the decree—Right of the judgment-debtor to recover the property sold—Error of Court about the effect of a compromise—Decree obtained through fraud and misrepresentation—Duty of a purchaser to refer to a decree under which the property was sold.*

A stranger, purchasing certain property from an auction-purchaser, in execution of a decree, which he had himself obtained against the judgment-debtor, on a compromise, is entitled to rely upon the plea, that he is a *bona fide* purchaser for value without notice, and the judgment-debtor is not entitled to the property, on a subsequent reversal of the decree (*n*).

The judgment-debtor has only an equity to set aside the proceedings which were the result of fraud and misrepresentation and that equity cannot be allowed to prevail against *bona fide* purchasers for value without notice.

Execution of Decree.—(Continued).

Where the Court has jurisdiction over the subject-matter of a suit, any error, on the part of the Court, as to the effect of a compromise, entered into between the parties would not render the decree void. Even assuming that the decree-holder in obtaining the decree had been guilty of misrepresentation or fraud, the proceedings are only voidable, and a *bona fide* purchaser from him is entitled to rely on his title as such.

It is by no means clear, that it was the duty of a stranger, the *bona fide* purchaser for value, when aware that the vendor's title was under a court-sale, to refer to the decree, on which the sale was held. **Ismail Rowther v. Raja Rowther**, 17 M.L.J. 165 = 2 M.L.T. 186 = 30 M. 295.

SUBRAHMANIA AIYAR and BENSON, JJ.

References :—(a) 10 A. 166 (P.C.) R., 13 M. L.J. 231, F.

- (10) *Decree for mesne profits against father—Attachment—Execution-proceeding struck off whilst attachment continued—Validity—Fresh proceeding in execution without attachment—Sale order—Death of judgment-debtor before sale—Sons and grandsons if bound.*

When an execution-proceeding is struck off, it does not necessarily put an end to the attachment.

It is competent for the Court to make an order striking off an execution-proceeding and, at the same time, continuing the attachment (a).

When an executing Court, in striking off an execution-proceeding, ordered the attachment to subsist for three months, and before that period expired, the decree-holder made a fresh application for execution, and the Court ordered sale proclamation to issue, in respect of properties attached in the previous proceeding, but the proclamation could not be served on the judgment-debtor, a member of a joint Mitakshara Hindu family, owing to his death,

held, that, there being a subsisting attachment followed by an order for sale made in the lifetime of the judgment-debtor, the decree-holder was entitled to proceed with the sale and realise his decree (b). **Peary Lal Sinha v. Chandl Charan Sinha**, 11 C.W.N. 163 = 5 C.L.J. 80.

RAMPINI and MOOKERJEE, JJ.

Execution of Decree.—(Continued).

References :—(a) 9 C.W.N. 601 = 82 I.A. 102; 1 C.L.J. 381, *relied on*; 18 A. 49, *Diss.* (b) 6 I.A. 88. F., 17 I.A. 194, D., 12 A. 440, R.

- (11) *Rules of execution different in different Districts—Practice—Procedure.*

Where, in different districts, different modes of execution are prescribed, and where the question is how a decree passed in one, but of which execution is sought in another, of such districts is to be executed, the executing Court must be guided by the rules in force in its own district.

Martand Trimbak v. Vinayak Kashinath, 8 Bom. L.R. 832 = 31 B. 5.

ASTON and BEAMAN, JJ.

- (12) *Restitution of property sold in, reversed in appeal—Procedure—See CIV. PRO. CODE, No. 193, A.W.N. (1906) 315 = 4 A.L.J. 19.*

- (13) *Application for personal decree where it was not necessary—Application in accordance with the law—Step in aid of execution—See LIMITATION ACT, No. 130, 4 A.L.J. 40.*

- (14) *Dispute between debtors—Application for possession—Objection that property purchased with the money of one of them not entertainable in execution—See CIV. PRO. CODE, No. 137, 4 A.L.J. 47.*

- (15) *Agreement to pay decree-debt in instalments—Formal order not drawn up under S. 210, Civ. Pro. Code, effect of, on limitation as to—See CIV. PRO. CODE, No. 95, 5 C.L.J. 25.*

- (16) *Wajib-ul-arz—Permission to tenants to transfer only the materials—Sale of house in execution of decree—Rights of purchaser—See LANDLORD and TENANT, No. 6, 10 O.C. 4.*

- (17) *Res judicata—Order permitting withdrawal of execution petition upon condition—Condition illegal and not bearing on any issue between parties—Subsequent application for execution—Right of decree-holder to disregard condition—See RES JUDICATA, No. 13, 11 C.W.N. 236.*

- (18) *Application by executor under the will of a Hindu lady governed by the Dayabhaga School—Objection by her sons and judgment-debtors—Order in execution—Right of—See CIV. PRO. CODE, No. 106, 11 C.W.N. 239.*

- (19) *Direction in decree to pay extra Court fee, effect of, on—See COURT FEES ACT (VII of 1870), No. 11, 16 M.L.J. 543 = 30 M. 32 = 2 M. L.T. 23.*

- (20) *Obstruction to, by a person not a judgment-debtor—Procedure—See CIV. PRO. CODE, No. 192, 16 M.L.J. 433 = 2 M.L.T. 34.*

Execution of Decree.—(Continued).

(21) Contribution by reason of mortgaged property purchased by decree-holder is to be worked out in a separate suit and not in—See **MORTGAGE (GENERAL)**, No. 10, 4 C.L.J. 573 = 94 C. 13.

(22) Decree for possession of equity of redemption—Decree-holder wrongfully obtaining possession of property instead of equity of redemption in execution of the decree—Suit by mortgagee claiming restitution of property—See **CIV. PRO. CODE**, No. 112, 5 P.R. 1907.

(23) Transfer of decree by operation of law—Decree transferred to one of the persons against whom it is passed as a legal representative of a deceased and against the property of the deceased—Execution by transferee—See **CIV. PRO. CODE**, 101, 3 Bom. L.R. 409.

(24) Joint decree for costs against three defendants and for mesne profits against two of them—Execution of decree for mesne profits, effect of, in keeping alive right to execute for costs—See **LIMITATION ACT**, No. 143, 2 M.L.T. 189.

(25) Application for, not accompanied by copy of decree—Application "in accordance with law"—Bombay High Court Rule 80 (Civil circulars)—See **LIMITATION ACT**, No. 128, 8 Bom. L.R. 892 = 31 B. 162.

(26) Against surety, for due performance of appellate decree, whether to be proceeded against him in—or by way of separate suit—See **CIV. PRO. CODE**, No. 146, 109 P.R. 1906 = 1 P.L.R. 1907.

(27) Revivor of decree—Release of one judgment-debtor—Execution against others—Contribution—See **LIMITATION ACT**, No. 144, 4 A.L.J. 405.

(28) Defective application for execution—Prayer for issue of notice, under S. 248, Civ. Pro. Code—Limitation Act, Art. 179—Step in aid of execution—See **LIMITATION ACT**, No. 132, 116 P.R. 1907.

(29)—against Khatedar of possession of land—Non-payment of Government assessment—Forfeiture—Re-letting under a Kabuliyat, effect of—See **CIV. PRO. CODE**, No. 194, 9 Bom. L.R. 1019.

(30) Obstruction to—Application by decree-holder for removal of obstruction—Rejection of application—Appeal—Revisional jurisdiction of High Court—See **CIV. PRO. CODE**, No. 190, 9 Bom. L.R. 936.

(31) Sale of immoveable property in execution of money-decree—Jurisdiction of appellate

Execution of Decree.—(Continued).

Court in which appeal pending to stay said—See **CIV. PRO. CODE**, No. 270, 11 C.W.N. 1090, (R.B.).

(32) Attachment of property in wife's name—Benami—Onus of proof—See **BENAMI TRANSACTIONS**, No. 1, 17 M.L.J. 389.

(33) Sale in execution of money decree—Time given to judgment-debtor to raise decree amount by private alienation—Validity—irregularity—Revision—See **CIV. PRO. CODE**, No. 170, 92 P.R. 1907.

(34) Compromise decree—Conditions restraining alienation—See **RESTRAINT ON ALIENATION**, No. 1, 10 O.C. 136.

(35) Suit for declaration that properties sought to be attached belong to judgment-debtor—Procedure—See **CIV. PRO. CODE**, No. 157, A.W.N. (1907), 207.

(36) Transfer of execution to Collector—Reference by Collector to District Judge—Order of District Judge—Government order rescinding notification empowering Collector to execute decree—See **REGULATION V OF 1904**, No. 1, 30 M. 193.

(37) Prior application for execution claiming interest not awarded by decree—Failure to object to claim—Objection in subsequent proceedings—See **RES JUDICATA**, No. 5, 17 M. L.J. 311.

(38) Decree for possession of immoveable property—S. 331, Civ. Pro. Code—Claim by person other than the judgment-debtor—Proper enquiry—See **CIV. PRO. CODE**, No. 191, 118 P.R. 1907.

(39) Transfer of jurisdiction from Court passing decree to another Court—Application for transfer of decree to that Court made to Court passing decree—Effect—See **CIV. PRO. CODE**, No. 96, 17 M.L.J. 417.

(40) Sale of property, the subject of a decree, whether necessarily carries with it the right to execute the decree—See **CIV. PRO. CODE**, No. 103, 4 A.L.J. 759 = A.W.N. (1907), 280.

(41) Order refusing to stay execution—Appeal—See **CIV. PRO. CODE**, No. 269, 146 P.R. 1907.

(42) Obstruction in good faith by third party—His remedy—See **CIV. PRO. CODE**, No. 193, 12 C.W.N. 115.

(43) Foreclosure-decree, applicability of S. 253, Civ. Pro. Code, to—See **CIV. PRO. CODE**, No. 150, 44 P.R. 1906 = 32 P.L.R. 1907.

(44) Power of Court executing decree to refer to judgment, or award on which the judgment

Execution of Decree.—(Concluded)

is barred, to interpret decree—See ACT XXIII of 1871 (PENSIONS), No. 1, 95 P.R. 1906=83 P.L.R. 1907.

(45) Dispute as to the right way of executing a decree, to be dealt with under S. 244, C.P.C.—See PRACTICE, No. 2, 9 Bom. L.R. 1361.

(46) Son's right to raise the question of the legality of debt in execution proceedings—See HINDU LAW (DEBTS), No. 8, 147 P.R. 1907.

(47) Property of third person sold in execution—His remedy—Right to recover money erroneously deposited under S. 310 A., C.P.C.—See CONTRACT ACT, No. 34 (b), 12 C.W.N. 151.

(48) Security bond by surety for performance of appellate decree, whether could be enforced by proceedings in—See CIV. PRO. CODE, No. (269-b), 125 P.R. 1906=94 P.L.R. 1907.

(49) Mortgage decree, whether attachment necessary for the execution of—Attachment of property—Application for removing attachment—C.P.C., S. 278—See MORTGAGE (GENERAL), No. 26, 4 L.B.R. 82.

Execution proceedings.

(1) Applicability of rule of res judicata to—See RES JUDICATA, No. 3, U.B.R. (1907), Civil Procedure, 1.

(2) Death of decree holder pending stay of—Right of minor to revive—Limitation—See LIMITATION ACT, No. 16, 11 C.W.N. 831.

Execution Sale.

(1) Waiver,—*Judgment-debtor foregoing right to object for irregularity and inadequacy of price, not on the ground of fraud—Investigation—Honest combination and dishonest concert, distinction between—Execution sale, when vitiated—Fraud—Decree-holder or auction-purchaser—Combination among bidders, lawful or unlawful—Test—Auction sale, bidders' combination.*

A judgment-debtor, who obtains an adjournment of sale upon the condition that he would not raise any objection on the ground of irregularity and inadequacy of price, does not waive his right to question the sale on the ground of fraud. He is entitled to have his allegation of fraud fully investigated (a).

It cannot be affirmed as an inflexible rule of law that a combination among intending purchasers not to bid against each other cannot under any circumstances amount to fraud (b).

All judicial sales of property should be free from undue influence, controlling or stifling competition and threat; but there is nothing to

Execution Sale.—(Continued).

prevent persons from combining from honest motives to purchase property at such sales (c).

There is a distinction between an honest combination among intending purchasers and a dishonest concert for the suppression of all competition (d).

The test, in each case, is, what was the object of the agreement among the bidders; it is the end to be accomplished which determines whether a combination is lawful or otherwise. If the object be to obtain the property as a sacrifice by artifice, the combination is fraudulent; if the object be to make a fair bargain or even to divide the property for the accommodation of the purchasers, the combination cannot be said to be fraudulent (e).

If fraud is established on the part of either the auction-purchaser or the decree-holder, the execution-sale is vitiated (f). **Ambika Prasad Singh v. R. H. Whitwell and Sitaram Singh**, 6 C.L.J. 111.

MOOREJEE and HOLMWOOD, JJ.

References:—(a) 6 C.L.J. 62, *P.* (b) 27 I. A 17=23 M. 227, *Expt.* (c) 6 Moo. C.P. 316; 3 Brod. and Bing. 116; 23 R.R. 626; 6 Car. and Pay. 239; 1 Coll. 243; 8 Jur. 507; 63 E.R. 402; 26 Beav. 187; 28 L.J. Ch. 218; 4 Jur. (N.S.), 1290; 7 W.R. 81; 53 E.R. 869; L.R. 19 Eq. 426, *R.* (d) 1 C.L.J. 85, *R.* (e) 15 Howard 494; 6 Wallace, U.S. 276; 7 Wallace, U.S. 559; 168 U.S. 471, *R.* (f) 6 C.W.N. 279; 6 C. W.N. 283, *R.* 20 M. 10, *dissented from.*

(2) *Sale in execution, suit to set aside—Parties bound by sale—Limitation Act, Sch. II, Art. 12 (a)—Civ. Pro. Code, S. 312.*

A sale in execution of a decree can only deal with and pass the right, title and interest of the judgment-debtor; and it cannot pass the right, title and interest of others than the judgment-debtor. S. 312, Civ. Pro. Code, states that the Court confirming the sale confirms it as regards parties to the suit and the purchaser.

Art. 12 (a) of the Limitation Act is not applicable to a case, in which the plaintiff was not a party to or bound by the sale, which is sought to be set aside. **Hajee Goya Kaka v. Zaccheus**, 4 L.B.R. 40.

HARTNOLL, J.

References:—(a) Bom. H.C. Rep. A.C.J. 139; 11 B. 119; 11 B. 130; 20 M. 118, *F.*

(3) *Application to set aside—Civ. Pro. Code, Ss. 244, 311—Agreement to pay on certain*

Execution Sale.—(Continued).

date—Forfeiture—Court of Equity, when to interfere—Contract, essence of—Intention.

Where an agreement secured simply one for the payment of money, relief is afforded against forfeiture on the ground that such condition and forfeiture are intended merely as a security for the payment of money.

It cannot be affirmed as a general rule that equity will relieve against forfeitures in all cases where compensation can be made. If forfeiture is occasioned by accident, fraud, surprise or ignorance, a Court of Equity will interfere and relieve against forfeiture so caused, but a Court of Equity will refuse to aid a defaulter, if the forfeiture is wilful or is the result of gross negligence.

Whether the time of performance fixed by an agreement is of the essence of the contract or not, depends upon the intention of the parties. It must be ascertained whether, in fact, the performance of the contract by one party was meant to depend upon the other party's promise being fulfilled by the day named therefor, or whether a day was named merely in order to secure performance within a reasonable time. If the former is found to have been the intention, no relief can be claimed against forfeiture; if the latter is found to have been the intention, equity will not refuse relief if the promise required to be performed was performed within a reasonable time.

When the parties agreed that, if the judgment-debtors pay a certain sum to the decree-holder within one month, the execution sale shall be set aside:

held, that the intention of the parties was that performance within the prescribed time was essential. Even if performance within the time had been merely material and not essential, no relief could be granted, unless the delay which occasioned the default was satisfactorily explained and accounted for. Such an agreement is a valid and enforceable agreement. **Harakh Singh v. Saheb Singh**, 6 C.L.J. 176.

MOOKERJEE and HOLMHOO, JJ.

Reference:—(a) 29 C. 577, R.

(4) *Entries in proclamation of sale as to encumbrance, how far binding on purchaser—Validity or otherwise of encumbrances wrongly entered therein—Liability of purchaser at an execution sale to pay off the encumbrances entered therein—Right of original owner to recover amount of encumbrance wrongly notified at the time of sale,*

Execution Sale.—(Continued).

but subsequently found to have been paid off—Purchaser at an execution sale for full value, liability of—Trust as to the amount of encumbrance wrongly entered.

On July 4th, 1896, one C mortgaged village G to the defendant for Rs. 4,000 and on August 21st, 1896, C mortgaged the same village G and a share in another village D to the defendant for Rs. 6,000. In execution of a money-decree held by two other persons the village G was put up for sale in October 1900 and was purchased by the defendant for Rs. 14,633. In the proclamation of sale it was stated that the village was subject to an encumbrance of Rs. 10,000 under the two deeds of 1896, above mentioned. As a matter of fact the mortgage of August 21st, 1896, had been paid off and only a sum of Rs. 5,543 was due on account of the mortgage of July 4th, 1896. After the sale the defendant was in due course put in possession of the property sold. In the present suit, the plaintiff, son of C, claimed redemption of the mortgage of July 4th, 1896, contending that the sale of the village G was not binding upon him inasmuch as at the time of sale the mortgage of August 1896 had been paid off and defendant having taken an advantage of this fact was a trustee of the village for him or at least of the benefit improperly obtained by him. The defendant contended that the sale was binding upon the plaintiff. It was proved that the mortgage of August 1896 had been paid off and that the village G was not worth more than Rs. 20,000.

Held, that the defendant, having purchased the property for Rs. 14,633 with an encumbrance of Rs. 5,543, had paid almost the full value of the property, and had not therefore obtained by his purchase any benefit of which he should be considered a trustee for the plaintiff.

Held, further, that a purchaser at an execution sale cannot avoid his purchase merely because charges not entered in the sale statement are found to be enforceable against the property, nor is such a purchaser bound to admit the existence or validity of charges, merely because they are entered in the sale statement. **Seth Jai Dayal v. Thakur Ambar Singh**, 10 O.C. 252.

CHAMBER, J.C. and GREEVAN, A.J.C.

(5)—of property subject to charge for maintenance—Applicability of principle of S. 55 (5) (d), Transfer of Property Act, to—See CONTRACT ACT, No. 30, 17 M.L.J. 250.

Execution Sale—(Concluded).

(6) Holding, at an earlier hour than that mentioned in proclamation of sale—Material irregularity—See CIVIL PRO. CODE, No. 176, U.B.R. (1907), Civil Procedure, 9.

(7) Setting aside of—Fraud—Rights of parties—See LIMITATION ACT, No. 80, 6 C.L.J. 17. (P.C.).

(8) Reversal of decree—*Ex parte* decree—Reversal of sale—See APPELLATE COURT, No. 2, 6 C.L.J. 92.

Executor.

(1) by implication, what constitutes—She-bait or trustee if executor by implication—See PROBATE, No. 1, 6 C.L.J. 453.

(2) Purchase of trust property by—Duty of—See TRUSTS ACT, No. 3, 9 Rom. L.R. 606.

Executory contract.

(1) Benefit of, if actionable claim and can vest in official assignee—See TRANSFER OF PROPERTY ACT, No. 1, 11 C.W.N. 566.

'Ex parte' decree.

(1) Setting aside of—Sale—Appeal against order setting aside sale—See CIV. PRO. CODE, No. 135, 6 C.L.J. 102.

(2) Decree set aside as against one of several joint judgment-debtors—Decree passed subsequently against exempted party—Execution of decree—See LIMITATION, No. 6, A.W.N. (1907), 204.

(3) Execution of—Reversal of decree—Reversal of execution sale—See APPELLATE COURT, No. 2, 6 C.L.J. 92.

(4) Setting aside—Principles applicable—See CIV. PRO. CODE, No. 68, 6 C.L.J. 226.

'Ex parte' order.

(1)—admitting appeal—Application to discharge—Delay, effect of—See LIMITATION ACT, No. 13, 12 C.W.N. 25.

Expert Evidence.

(1) Practice—Costs—Solicitor—Expert knowledge as to handwriting—Extra charges for the work—Taxing Master's decision—Review by Chamber Judge.

In a suit to obtain probate of a will, the defence was that the will was a forgery. The defendant's solicitor, failing to obtain an expert in handwriting, made a special study of the subject occupying 128 hours, and arrived at the conclusion that the will was not genuine. He then, notwithstanding Counsel's opinion to the contrary, got the suit decided in his clients' favour. In his bill of costs, the defendant's soli-

Expert Evidence—(Concluded).

citor claimed his extra fees for the special work; but the Taxing Master disallowed the claim :—

Held, in review of taxation, that the solicitor was entitled to special remuneration for his work in qualifying himself as an expert in handwriting. *Dahibai v. Sunderji Damji*, 9 Rom. L.R. 819=31 B. 430.

RUSSELL, J.

Ex-Proprietor.

(1) Right to sell a house—Common law—Sale of site and materials—Wajib-ul-arz.

A *wajib-ul-arz* provided that an ex-proprietor had a right to sell the materials of the house; *held* that the terms implied that the site could not be sold and a purchaser from the ex-proprietor could not acquire the right to live in the house. Such was also the common law of these provinces. *Jamna Prasad v. Panna Lal*, 4 A.L.J. 754=A.W.N. (1907), 287.

GRIFFIN, J.

Reference :—20 A. 248, R.

Falkar.

(1)—rent is rent within the meaning of Bengal Tenancy Act—See Act VIII of 1885 (BENGAL TENANCY), No. 30, 6 C.L.J. 669.

False imprisonment.

(1) Information given to the Police—Prosecution after investigation—Acquittal of accused—Suit for damages for—against informant, maintainability of.

A informed the Police that certain persons had attempted to murder him and named the plaintiff and others as being those, who had done the act. The Police, after holding an investigation, sent them to a Magistrate. After holding a preliminary inquiry, the Magistrate committed them for trial to the Court of Session. The trial resulted in the acquittal of the accused. A was now sued for damages for false imprisonment. *Held*, that the suit was not maintainable. *Balbhaddar Pande v. Basdeo Pande*, 3 A.L.J. 650=29 A. 44.

STANLEY, C.J., and RUSTOMJEE, J.

Reference :—26 M. 262, Appl.

Fees.

Advocate's rights to sue for fees—See ADVOCATE, No. 2, 4 L.B.R. 55 (F.B.).

Fishery Right.

(1) Fishery right in tidal and navigable river when the river changes its course—Right of Government.

Fishery Right —(Concluded).

When a tidal and navigable river shifts its course, fishery rights continue to subsist in the river in its new course.

Government has the right to lease fishery rights in tidal and navigable rivers (a). **Ayub Ali Chowdhury v. Daya Bibi**, 12 C.W. N. 105.

HAMPINI, C. J. and SHARFUDDIN, J.

Reference :—(a) 10 C.W.N. 540 = 4 C.L.J. 51 D.

Foreign Company.

(1) *Right of, to sue in British Courts.*

A corporate body under the law of a foreign country can undoubtedly sue as such, under its corporate name, in British Courts throughout the world, but it must give some proof that it is duly incorporated under the law of such country. **Leong Ah Foon v. The Italian Colonial Trading Company**, 3 L. B.R. 261.

Fox, C.J., and IRWIN, J.

Reference :—L. R., 7 Q. B. 293, H.

Foreign judgments.

(1) *Submission to jurisdiction of Bustar Court—Reference to arbitration—Invalidity of the award—Second reference without consent—Validity of second award—Foreign judgments—Jurisdiction of British Courts—S. 530, C.P. Code.*

The first defendant appeared as a party and submitted to the jurisdiction of the Bustar Court. The Court thereupon referred the matter to arbitrators, whose award became void according to the rules of procedure adopted by that Court. Subsequently, the Court, of its own motion, referred the matter to a second set of arbitrators, without the first defendant's consent. The first defendant did not make any objection to the filing of the award.

Held, that the first defendant was not competent to raise objection to the decision of the Bustar Court based on the award, in the Courts of British India, on the ground of his want of consent.

* Foreign judgments are binding upon the parties thereto in British Courts, even though the formalities of procedure, which ought to have been observed by the foreign Court, were not observed. (a) **Gudaru Leela Krishnayya Naidu v. Maradu Gala Venkatarathnam**, 2 M.L.T. 269 = 30 M. 292.

SUBRAHMANTIA AIYAR and MILLER, JJ.

Reference :—(a) L.R. (1899) 1 Ch. 781, B.

Foreigners.

(1) *Suit against—Jurisdiction—See LETTERS PATENT (MADRAS), No. 1, 17 M.L.J. 304.*

Forfeiture.

(1) *Consent decree in terms of compromise—Forfeiture clause in the decree—Court's power to relieve against—See CIV. PRO. CODE, No. 217, 8 Bom. L.R. 813 = 1 M.L.T. 828 = 31 B. 15 (F.B.).*

(2) *When equity will relieve against—See EXECUTION SALE, No. 3, 6 C.L.J. 176.*

Forma pauperis.

(1) *Right to sue in—Civ. Pro. Code, Ss. 407 (c), 409.*

Where a person obtained a conviction against another, which was set aside on appeal, on the ground that the Magistrate was not competent to try the case, and the latter thereupon applied for permission to sue in *forma pauperis* for damages for malicious prosecution, the Court should not dismiss the application, on the ground that the suit is not maintainable, because of the applicant not having been acquitted on appeal by reason of the original conviction having proceeded on evidence which the complainant knew to be false or on the wilful suppression of material information by him. The question whether the suit was not maintainable on such a ground is one, which was outside the scope of the question, which the Court had authority to decide under S. 409, and pertained to the merits of the case. The Court should proceed with the enquiry into the pauperism of the applicant and pass the necessary orders under that section. **Perobshaw Serobshaw v. Gawri Dutt Bogla**, 3 L.B.R. 248.

IRWIN, J.

References :—26 M. 506, 8 C.W.N. 70, 9 Burma L.R. 130, R.

(2) *Limitation Act (XV of 1877), Ss. 4 and 14—Suit, institution of—Pauper—Application for leave to sue as pauper—Rejection of application—Time granted by Court for payment of Court-fees—Payment of Court-fees at the time when the suit was barred—Civ. Pro. Code (Act XIV of 1882), S. 409.*

The plaintiff applied to the Court, on the 19th August, 1903, for leave to sue in *forma pauperis*. The application was inquired into and was rejected by the Court, on the 15th October 1904. On the same day, the Court, on the plaintiff's application, granted him one

Forma pauperis.—(Concluded).

month's time to pay the Court-fees. The Court-fees were paid on the 14th November 1904.

The defendants contended that the suit should be taken as instituted on the day the Court-fees were paid, and it was, therefore, barred:—

Held, (1) that the suit was barred (a).

(2) that, even supposing that S. 14 of the Limitation Act, 1877, applied to the case, there was no good faith on the part of the plaintiff, in regard to the pauper proceedings. **Keshavlal Hiralal v. Mayabhai Premchand**, 9 Bom. L.R. 204.

JENKINS, C.J., and CHANDAVARKAR, J.

References:—(a) 20 B. 503, F. 6 I.A. 126 = 2 A. 241, distinguished.

(3) *Civ. Pro. Code, S. 411—Suit in forma pauperis—Court-fee—Property of defendant sold to realize Court-fee—Property sold subject to a mortgage—Rights of mortgagee.*

Held, that the sale, subject to a mortgage, of property belonging to the defendant in a suit brought in *forma pauperis*, for the purpose of realizing the Court-fee payable to Government by the plaintiff, does not preclude the mortgagee from bringing to sale the same property, in execution of a decree for sale, on his mortgage. **Dost Muhammad Khan v. Mani Ram**, A.W.N. (1907), 157 = 29 A. 537 = 4 A.L.J. 720.

STANLEY, C.J. and AIKMAN and RICHARDE, JJ.

References:—2 A. 196, overruled; 1 B. 7, D.

(4) Compromise of suit in—withdrawal of suit—Failure in the suit, meaning of—See *Civ. Pro. Code*, No. 225, 8 Bom. L.R. 689 (F.B.) = 31 B. 10.

(5) Party suing in, not satisfied with prothonotary's decision—Application to judge in chambers—See *HIGH COURT RULES (BOMBAY)*, No. 4, 9 Bom. L.R. 475.

Fraud.

(1) Whether decree of superior Court can be declared void by inferior Court on ground of fraud—See *JURISDICTION (GENERAL)*, No. 4, 11 C.W.N. 579.

(2) Suit to set aside decree on ground of Fraud—No further relief claimed—See *JURISDICTION (GENERAL)*, No. 2, A.W.N. (1907), 112.

(3)—in decree and in execution proceedings—Remedy—See *Civ. Pro. Code*, No. 74, 5 C.L.J. 828.

Fraud.—(Concluded).

(4) Plaintiff's failure to prove his case of fraud—whether he can be permitted to support case on different ground—See *MORTGAGE (GENERAL)*, No. 19, 5 C.L.J. 658.

(5) Purchase of occupancy holding—Repurchase by him in execution of rent decree—Annualment of encumbrance—No fraud—See *ACT VIII OF 1885 (TENANCY BENGAL)*, No. 31, 12 C.W.N. 114.

(6)—in execution sales—Waiver—See *EXECUTION SALE*, No. 1, 6 C.L.J. 111.

Fraudulent Transfers.

(1) *Plea of Benamsee in—*

Every hindrance possible should be placed on the fraudulent disposal of property in order to cheat creditors, and, where a person makes such a fraudulent disposition or a disposition with such a fraudulent intention, the Courts should not grant him relief, by putting him back into the position that he was in, before he made it. The refusal of relief in such cases would tend to restrict the practice, as persons will be less prone to resort to fraud, for fear of the consequences. The protection of the creditor is a much more important matter than the granting of relief to a person, who has lent himself to fraudulent practices, whether the intended fraud has been carried into effect or not. No question of encouraging fraud on the part of the benamsee holder should affect the question in such a case. **Ma Le v. Po Taik**, 3 L.B.R. 245.

FOX, C.J., and HARTNOLL, J.

References:—11 B. 708, 20 M. 326, F; 10 C.W.N. 650, 21 W.R. 422, Diss; 9 Equity 475, R.

(2) *Party to a fraud—Estate conveyed to a benamidar—Plaintiff not entitled to rely upon his fraud—Defendant not entitled to rely upon his fraud in defence.*

When a fraud has been carried into effect, a party to it cannot, as plaintiff, plead the fraud to vitiate the transaction. Nor is it open to him, as defendant, to plead his own fraud as an effective answer to a claim to immoveable property conveyed by him to a benamidar. **Shidlingappa Ganeshappa v. Hirasa Tukasa**, 9 Bom. L.R. 542 = 31 B. 405.

JENKINS, C.J., and BEAMAN, J.

(3) —of moveable property—Validity of—See *TRANSFER OF PROPERTY ACT*, No. 21, 16 M. L.J. 427 = 1 M.L.T. 351 = 30 M. 6.

Fraudulent Transfers.—(Concluded).

(4) See TRANSFER OF PROPERTY ACT, No. 28, 11 C.W.N. 889.

Freedom of Religion Act.

See ACT XXI OF 1850.

Ganjam and Vizagapatam Agency Rules.

(1) Rule 20—See LIMITATION ACT, No. 59, 17 M.L.J. 147.

Gift.

(1) *Necessity for delivery of possession under Mahomedan Law—Subject-matter of gift remaining in donor's hands, effect of—Contract Act, S. 25, Expln. 1—Buddhist Law (Gifts).*

S. 4 (1) of the Upper Burma Civil Courts Regulation (or S. 13 of the Burma Laws Act, 1898) only refers to cases of succession, inheritance, marriage or caste, or any religious usage or institution. And questions relating to gifts, which do not fall under any of those heads, must be governed by S. 25, Contract Act. This has been so held in regard to gifts by and to Buddhists (*a*). The effect of Expln. 1 to S. 25, Contract Act, is that a gift actually made is valid, though it may not have been expressed in writing or registered.

The Mahomedan Law does not render it impossible for a husband to make a gift to his wife of the house in which they both live (*b*). Actual delivery of possession is not necessary. If the character of the possession changes, the mere retention of the subject-matter of the gift in the hands of the donor would not affect the validity of the gift.

Under the Mahomaden Law, the husband takes a fourth of his wife's estate, where there are children.

It depends upon the circumstances of each case whether the Mahomedan or the Buddhist Law applies to gifts. **Abdul Gafur v. Deyan Singh**, U.B.R. (1907), Buddhist Law—Gift 1.

SHAW, J.C.

References:—(a) C.A. No. 208 of 1905 (unpublished), *R*; (*b*) 28 A. 147, *R*.

(2)—by adopted son to father—Fiduciary relationship of father and adopted son—Burden of proof of undue influence—See CONTRACT ACT, No. 4, 17 M.L.J. 19=2 M.I.T. 4=80 M. 169 (*P.B.*).

(3) Residence of donor in house given away—Validity of gift—See MAHAMEDAN LAW (GIFT), No. 1, 2 M.I.T. 180.

Gift.—(Concluded).

(4)—of land, made on conditions that it would be liable to be taken back, in the event of donee transferring it, whether repugnant to the original transfer—See TRANSFER OF PROPERTY ACT, No. 12, 4 A.L.J. 708.

Good-will.

(1)—*Sale of good-will—Seller not entitled to solicit old customers—Newspaper—Sale of proprietary rights.*

Where a person sells his good-will in a business, the vendor after sale is not entitled to solicit his old customers to the prejudice of the purchaser.

Hence, where the proprietor of a newspaper sells all his rights in it to another, he is not entitled to solicit the old customers of the paper when it was under his control. **Damodar Laxman Lele v. Kashinath Waman Lele**, 9 Bom. L.R. 312.

RUSSELL and ASTON, JJ.

(2) Survival of—See TRUSTS ACT, No. 3, 9 Bom. L.R. 606.

Goshain.

(1) Posthumous *chela*—Appointment by widow of Goshain—inheritance—See HINDU LAW (INHERITANCE), No. 1, 3 A.L.J. 717.

Grant.

(1) Construction of doubtful grant—See LEASE, No. 1, 11 C.W.N. 809.

(2) Endowments for religious purposes and personal grants—Applicability of S. 4 of Pensions Act—See ACT XXIII OF 1871 (PENSIONS), No. 4-a, 17 M.L.J. 549.

Guardian ad litem.

(1) *Civil Procedure Code, S. 444—Duty of Court as regards appointment of a guardian ad litem.*

Where the defendant or respondent to a suit or appeal is a minor, it is the duty of the Court not only to appoint a guardian, but to satisfy itself that the proposed guardian is a fit and proper person to represent the minor, to put in a proper defence and generally to act in the interests of the minor. The duty of the Court is not a mere matter of form. **Ram-chandra Das v. Joti Prasad**, A.W.N. (1907), 225=29 A. 675.

KNOX, C.J., and RICHARDS, J.

*Reference:—*30 I.A. 182, *D*.

(2)—*who cannot be served—Court's duty—Procedure.*

Guardian ad litem.—(Concluded):

Where a guardian *ad litem* is absent from the country and so cannot be served with a notice, he is useless, and the Court should proceed to appoint another guardian. If a Court-sale takes place with such a guardian for the minor, the minor should be considered to have been unrepresented when the sale took place. The sale should, consequently, be set aside (a). **Abba Beeni v. Maidirsa Rowther**, 17 M.L.J. 179.

BENSON and WALLIS, JJ.

Reference:—(a) 32 C. 296, R.

(3) *Guardian ad litem—Appeal—Guardian ad litem not made a party by appellant—Limitation.*

Where a guardian *ad litem* of a defendant respondent was not made a party to an appeal filed by the plaintiff, until after the period of limitation for filing such appeal had expired, it was held that the appeal was not for this reason time barred. **Rup Chand v. Dasodha**, A.W.N. 1907, 290.

STANLEY C.J., and BURKITT, J.

Reference:—4 A. 37, F.

(4) Appointment of, how long continues—See CIV. PRO. CODE, No. 111, 5 C.L.J. 434.

(5) Reference to arbitration by, of minor, without Court's sanction, validity of—See CIV. PRO. CODE, No. 223, 4 P.R. 1907 = 20 P.W.R. 1907.

(6) Court's power to appoint—Effect of appointment—See MAHOMEDAN LAW (SUCCESSION), No. 3, A.W.N. (1907), 221.

(7) Whether married woman to be appointed as, of her minor son, while her husband is alive, but *non compos mentis*—See CIV. PRO. CODE, No. 233, 4 A.L.J. 698.

(8) Married woman appointed, for her minor sons—Validity—See CIV. PRO. CODE, No. 232, 6 C.L.J. 36.

(9) Appointment of, conditions necessary for—See CIV. PRO. CODE, No. 232-a, 10 O.C. 321.

Guardian and Minor.

(1) *Suit for account by minor against his agent—Advances made for minor's benefit—Guardian's power to bind minor—Principal and agent.*

Where a minor comes to Court to have an account taken as between himself and his agent, and it is found on taking that account that the agent has made certain advances to the guardian of the minor and that those advances had been applied for the benefit of the minor, it

Guardian and Minor.—(Continued).

was held that the agent ought to be allowed those advances in taking the accounts.

Where the plaintiff seeks relief from a Court administering equity, he must do equity himself.

A guardian cannot bind his minor ward by a personal covenant (a). **Surendra Nath Sarkar v. Atul Chandra Roy**, 34 C. 892.

MACLEAN, C.J., and HOLMWOOD, J.

Reference:—11 B. 551, F.

(2) *Guardian ad litem, duty of—Decree, when to be set aside, for the negligence of the guardian—Test—Minor, to prove what.*

The guardians of infants are not bound to contest all claims against an infant's estate whether well or ill-founded (a).

If the omission by a guardian to plead a defence is fraudulent or amounts to gross misconduct, the decree may be avoided (b).

If there has been gross negligence on the part of a next friend in the conduct of a suit, the decree may be successfully impeached by the infant (c).

The test is, whether the inaction of the guardian amounted to neglect of duty or was in best interests of the infant. It is not every kind of negligence nor any amount of negligence which would render proceedings, otherwise regular and proper, liable to be opened up; it must be such negligence as leads to the loss of a right, which, if the suit had been conducted or resisted with due care, must have been successfully asserted (d).

It is not sufficient for the minor to allege that the suit was not defended by the guardian *ad litem*; it ought to be alleged and proved that an available good ground of defence was not put forward at the hearing by the omission of the guardian to appear at the trial (e). **Parmeswari Pershad Narayan Singh v. Sheo Dat Rai**, 6 C.L.J. 448.

MOOREJEE and HOLMWOOD, JJ.

References:—(a) 14 M.L.A. 393 (399), R. (b) 3 C.L.R. 17, R. (c) L.R. 18 Eq. 573 and 22 C. 8, R. (d) 5 C.W.N. 58, R. 6 C.L.R. 69 (e) 12 C. 69; 2 C. 283 (286); 25 W.R. 448.

(3) *Contract of sale and purchase—Minor—Contract by guardian—Specific performance—Personal liability.*

WOODBORFFE, J.—Specific performance may be granted of a contract entered into by a guardian on behalf of a minor, if the contract be

Guardian and Minor.—(Continued).

one which, being within the guardian's powers, binds the minor.

An agreement for sale and purchase entered into on behalf of a minor may be specifically enforced, notwithstanding the fact that it involves a personal liability to pay the price, if the agreement be carried out, and also damages in lieu of, or in addition to, specific performance, if the agreement be broken (a). **Mir Sarwarjan v. Fakhraddin Mahomed Chowdry**, 11 C.W.N. 34 and 207 = 34 C. 163 = 1 M.L.T. 360 = 4 C.L.J. 431.

RAMINI and WOODROFFE, JJ.

Reference :—14 I.A. 89, P.

- (4) *Contract—Specific performance—Contract to sell by guardian with permission of Judge—subsequent sale with permission for higher prices.*

A Court will not specifically enforce a contract, made by the guardian of a minor, if it is shown that it was made to the detriment of the minor.

Where, therefore, a guardian contracted to sell to A the minor's property for Rs. 725, with the permission of the Judge, and subsequently sold it to B for Rs. 825, with the renewed sanction of the Judge, who, however, gave notice of the higher bid to A, who declined to pay the higher figure, *held* that the first contract could not be specifically enforced. **Chittar Mal v. Jagannath Persad**, 4 A.L.J. 24 = A.W.N. (1907) 25 = 29 A. 213.

STANLEY, C.J., and BURKITT, J.

- (5) *Cessation of guardian's powers when minor comes of age—Court's jurisdiction to order guardian to spend minor's property after such cessation—Appeal—Revision.*

Under S. 4 (2) (c) of Act VIII of 1890, the powers of a guardian cease from the date on which the minor comes of age, and after that period, the Court has no jurisdiction to make an order, allowing the guardian to spend the property of the ward, for the marriage of the wards's sister, however proper the expense might be in the interests of the girl. No appeal lies against such an order, but the Court may treat the appeal as a revision petition under S. 622, Civ. Pro. Code. **Seetharama Bhagavathar v. Balarama Bhagavathar**, 17 M.L.J. 199.

BENSON and WALLIS, JJ.

- (6) *Considerations for appointment of guardian of the person of minor—See Act VIII of*

Guardian and Minor.—(Concluded).

1890 (GUARDIANS AND WARDS), No. 5, 9 Bom. L.R. 923.

- (7) *Status of a Mahomedan mother as guardian of the property of her minor children—See MAHOMEDAN LAW (SALE), No. 1, 4 C.L.J. 578 = 11 C.W.N. 160 = 34 C. 65.*

- (8) *Question whether sale by guardian was for benefit of minor, whether a question of fact or of law—See MAHOMEDAN LAW (ALIENATION), No. 1, 4 C.L.J. 485 = 11 C.W.N. 71 = 34 C. 36.*

- (9) *Sufficiency of order for certificate of guardianship under Act XX of 1864 (Bombay, —See ACT IX OF 1875 (INDIAN MINORITY), No. 2, 8 Bom. L.R. 897 = 31 B. 80.*

- (10) *Suit for money advanced to minor—Registration of bond executed by guardian—Necessaries supplied to minor—See LIMITATION ACT, No. 66, 10 O.C. 38.*

- (11) *Sale by de facto guardian of Mahomedan minor—Effect on the minor—See TRANSFER OF PROPERTY ACT, No. 15, 1 M.L.T. 433 = 17 M.L.J. 9.*

- (12) *Hindu Law—Mother in possession on behalf of minor son—Possession of mother, nature of—See ADVERSE POSSESSION, No. 2, 17 M.L.J. 14.*

- (13) *Suit to set aside compromise entered into by pleader engaged by the guardian of the minors, against the express wishes of the guardian—Grounds other than fraud—Right of suit—See MINORS, No. 2, 34 C. 83.*

- (14) *Mortgage of minor's property by natural and de facto guardian—Minor's liability—Liability to pay interest—See MORTGAGE (GENERAL), No. 11, 5 C.L.J. 542.*

- (15) *Mortgage by guardian—Proof of mortgagee's belief in the existence of a reasonably credited necessity—See ACT V OF 1881 (PROBATE AND ADMINISTRATION), No. 6, 2 M.L.T. 343.*

- (16) *Certified guardian—Discharge of debt due to a minor given by his brother without concurrence of certified guardian—Effect—See TORTS, No. 1, 6 C.L.J. 383.*

- (17) *Certificated guardian, mortgage executed by, without the sanction of the Court—Not void ab initio—Its nature and effect—See CIV. PRO. CODE, No. 232, 10 O.C. 321.*

- (18) *Suit by minor, to set aside decree passed against him—Want of proper representation or gross negligence of guardian ad litem to be proved—See CIV. PRO. CODE, No. 232-a, 10 O.C. 321.*

Guardian and Wards Act.

See ACT VIII OF 1890 (GUARDIANS AND WARDS).

Haqq-buha.

for the recovery of—Jurisdiction—See ACT XVI OF 1887 (PUNJAB TENANCY), No. 4, 95 P.R. 1907 (Foot-note).

Hereditary Village Offices Act.

See ACT III OF 1895 (MADRAS).

High Court.

(1) Powers of, to interfere with appellate judgment under S. 195, cl. (6), Crim. Pro. Code—See SECTION TO PROSECUTE, No. 6, 11 C. W.N. 195.

(2) Power to revise proceedings in the Bombay Court of Small Causes—See CIV. PRO. CODE, No. 303, 8 Bom. L.R. 969=31 B. 138.

(3) Power of High Court in framing rules under S. 652, C. P.C.—See HIGH COURT RULES (BOMBAY), No. 2, 9 Bom. L.R. 1138.

High Court Rules (Bombay).

(1) *Third party proceedings, object of—When leave should be granted—Refusal to give directions on summons amounts to a dismissal of the third party.*

The object of third party proceedings is to enable the Court to try once for all an issue of fact, in which all parties are alike interested. The Court has to see, first, that nothing is done, which would put a plaintiff to additional expense or difficulty, and secondly, that he is not embarrassed by the introduction of third party in his suit.

An action comes to an end, as regards the third party, when the Court refuses to give directions on summons. Such refusal amounts to a dismissal of the third party from the action.

In giving leave to serve notice of claim for contribution or indemnity on a third party, the Court will not consider whether the claim is a valid one, but only whether the claim is *bona fide*, and whether, if established, it will result in contribution or indemnity. **Shivlal Nanakram v. Shrikisson Balkissondas and Mitchel & Co.**, 9 Bom. L.R. 374=31 B. 465.

DAVAR, J.

(2) *Rules 17, 18 and 25—Certified copies required by the rule—Limitation Act (XV of 1877)—Civ. Pro. Code (Act XIV of 1882), S. 652—Presentation of memoranda of second appeals, &c.—Accompaniments.*

High Court Rules (Bombay).—(Continued).

An appeal, &c., if presented in time is validly presented for the purpose of the Limitation Act if it is accompanied by copies required by the Code of Civil Procedure, 1882.

The accompaniments directed under rule 25 of the High Court Rules are extraneous to the memoranda of appeals, applications or appeals in execution, and the rule does not fix any time within which they are to accompany the memoranda, &c.

Per Chandavarkar, J.—No rule of High Court can add to or modify the conditions and limitations of the law laid down in the Limitation Act. It is true that the Court has the power of making certain rules given it by S. 652 of the Civ. Pro. Code, and those rules must be "consistent with" the Code. But there is no power given to frame a rule modifying any rule or mode as to computation of limitation prescribed, expressly or by necessary implication, in the Limitation Act. **Chunilal Jethabai v. Dahyabhai Amulakh**, 9 Bom. L.R. 1138 (F.B.)=2 M.L. T. 410.

RUSSELL, AG. C.J., CHANDAVARKAR, HEATON and KNIGHT, JJ.

(3) Rule 80 (Civil circulars)—Construction of,—Application for execution not accompanied by copy of decree—See LIMITATION ACT, No. 128, 8 Bom. L.R. 892=31 B. 162.

(4) *Rule 80 A 1—Pauper, petition to sue as—Prothonotary's decision—Application to Judge in Chambers.*

Under Rule 80 A 1 of the Bombay High Court Rules, it is the right of a party dissatisfied with the Prothonotary's decision, to apply to the Judge to have the matter adjourned to him; and the Judge in Chambers is bound to take up the matter and decide it for himself. **Meghbal v. Poonjabai**, 9 Bom. L.R. 475.

DAVAR, J.

(5) *Rule 544—Taxation—Bill of costs—Practice.*

Rule 544 of the High Court Rules is not exhaustive. It gives a party chargeable with the bill power to apply to have his attorney's bill taxed, but it makes no corresponding provision enabling the attorney to apply to have his bill taxed without the consent of the party chargeable therewith.

Apart from the Rule, the Court has inherent jurisdiction to make any order that seems to the Court reasonable and necessary in the

High Court Rules (Bombay).—(Concluded).

interests of justice, when one of its officers applies to the Court for an order for taxation of his costs due to him by his client. *In re Framji Cawasji Markar, In re Costs of Crawford & Co*, 9 Bom. L.R. 1014.

DAVAR, J.

(6) Rule 577—Practice as to allowing costs of counsel—Costs of third counsel in a defended long cause—See *COSTS*, No. 2, 9 Bom. L.R. 983.

(7) Rule 859, limitation for proceedings under—See *LIMITATION ACT*, No. 125, 9 Bom. L.R. 508.

High Court Rules (Calcutta).

(1) *Rule 515 A (10)—Registrar, power of, to dismiss a suit for want of prosecution.*

In a case where the Registrar had made a peremptory order that the plaintiff should file her affidavit of documents within a certain time, and, in default, the suit to stand dismissed for want of prosecution ;

Held, that the effect of the Registrar's order was to fix a date peremptorily within which the affidavit must be filed and that, in default, the suit is liable to be dismissed on an application made to the Court.

If, by the new Rule 515 A (10), it is intended to give the Registrar power to pass a decree, the Rule is *ultra vires*.

The Court also can pass an order dismissing a suit, and an appeal lies from such an order (*a*).

Kamalakhya Dossee v. Jotindra Mohun Banerji, 6 C.L.J. 374.

WOODROFFE, J.

Reference:—(*a*) 19 B. 307. F.

(2) Rule 515 A—Authority to Registrar or Master to grant leave to sue—*ultra vires*—See *LETTERS PATENT* (1865), No. 2, 5 C.L.J. 405 and No. 1, 11 C.W.N. 663.

High Court Rules (Madras).

(1) Rules 154 & 155 of the Original Side rules—Application to set aside dismissal for default—See *LIMITATION ACT*, No. 117, 17 M.L.J. 215.

High Court Rules (N.W.P.).

(1) Rule 197 of—Suspension of Advocate—Disciplinary authority of High Court—Counsel guilty of contempt—See *LETTERS PATENT* (N.W.P.), No. 1, 4 A.L.J. 34=9 Bom. L.R. 9. (P.C.).

Hindu Law.

1.—GENERAL.

2.—ADOPTION.

3.—ALIENATION.

4.—CEREMONIES.

5.—CONVERSION.

6.—DEBTS.

7.—GIFT.

8.—GUARDIANSHIP.

9.—IMPARTIBLE ESTATES.

10.—INHERITANCE.

11.—JOINT FAMILY.

12.—MAINTENANCE.

13.—MARRIAGE.

14.—PARTITION.

15.—RELIGIOUS ENDOWMENTS.

16.— " MATTERS.

17.—REVERSIONERS.

18.—SELF-ACQUISITION.

19.—STRIDHAN.

20.—SUCCESSION.

21.—SURVIVORSHIP.

22.—WIDOW.

23.—WILL.

—*1.—(General).

(1) Suit for redemption by father dismissed—Second suit by sons—Only son's share redeemable—See *MORTGAGE (REDEMPTION)*, No. 3, 4 A.L.J. 17.

(2) Construction—Text of Mitakshara ordaining an omission to be sinful—Nature of obligation imposed—See *HINDU LAW (SUCCESSION)*, No. 5, 9 Bom. L.R. 1187.

—2.—(Adoption).

(1) *Sapinda's consent—Condition & Validity of consent.*

A stipulation, by a sapinda assenting to an adoption, that the adopted boy should not share in the joint property of the family into which he was to be adopted, but should be content with the property coming to him from his adoptive mother, would not by itself invalidate an adoption. Such a stipulation by a sapinda does not show that he was actuated by corrupt or improper motives in giving his consent or that he did not consider the boy a suitable candidate for adoption, but shows that he only endeavoured to protect himself from loss resulting from the property vesting in the adoptee after the adoption. The Court, however

Hindu Law.—(Continued).

—2.—(Adoption).—(Continued).

decided nothing as to the effect of the stipulation. **Srinivasa Aiyangar v. Rangaswami Aiyangar**, 17 M.L.J. 322=2 M.L.T. 364=30 M. 150.

BENSON and WALLIS, JJ.

Reference:—11 M.L.J. 20, *distgd.*

- (2) *Widow adopting with the consent of one of two kinsmen*—Consent given on misrepresentation of her husband's authority nullifies the transaction.

Where the consent of one of the two nearest kinsmen, to the adoption made by a widow, was absent, but the widow had obtained the consent of the other, on the representation that she had received her husband's authority to adopt, and it was found that no such authority was given:

Held, that the adoption was invalid. **Jonnalagadda Venkamma v. Jonnalagadda Subrahmaniam**, 9 Bom. L.R. 89 (P.C.)=4 A.L.J. 150=5 C.L.J. 140=11 C.W.N. 345=17 M.L.J. 114=2 M.L.T. 91=30 M. 50.

LORD DAVEY, LORD ROBERTSON, SIR ANDREW SCOBLE & SIR ARTHUR WILSON, JJ.

- (3) *Adoption by widow declared 'invalid'—Continued residence of adoptee with widow*—Renunciation of rights in natural family in consideration of widow's reversioners relinquishing their rights to succeed on widow's death—*Transfer of Property Act, S. 6 (a)*—*Limitation Act, Art. 127*—*Adoptee's rights in natural family.*

Where a person was adopted, when a child, by the widow of one S, but, in 1883, his adoption was declared invalid, and he, however, continued to reside with the widow and, in 1896, orally renounced his rights to share in the property of his natural family, in consideration of a relinquishment by the reversionary heirs of S of their rights to succeed to his estate on the death of the widow; *held*, that the oral renunciation, even if valid, was without consideration, inasmuch as the relinquishment by the reversioners was in effect a transfer of an expectancy, which was a nullity by virtue of S. 6 (a) of the *Transfer of Property Act* (a). Moreover, there is nothing to indicate that he abandoned, before 1896, his claims to enjoy the property of his natural family or that he was excluded from such enjoyment, and, therefore, *Art. 127, Limitation Act*, is no bar to a suit by the adopted

Hindu Law.—(Continued).

—2.—(Adoption).—(Concluded).

son for his share of the property of his natural family. **Dhoorjeti Subbayar v. Dhoorjeti Venkayya**, 2 M.L.T. 184=30 M. 201.

MILLER and WALLIS, JJ.

Reference:—(a) 29 C. 355, R.

- (4) *Construction of authority to adopt—Bandhuvalius, meaning of.*

The authority to adopt given by the will of a Hindu to his wife ran as follows:—"If my younger brother N has children, and if he would give his second son among them in adoption, he should be taken. In the meanwhile, if another is adopted, much trouble would occur. If a boy is available among relations, with reference to whom trouble may not ensue, he may be taken." The construction of the above words was held to be that, if the boy to be adopted is not the second son of the brother, the testator meant that he should be taken from a family of relations, who were not likely to give trouble to the widow, that the concluding sentence was intended as advice or recommendation to the widow, and that the testator did not intend to make the adoption of a stranger dependent upon his brother's consent.

The word "Bandhuvalius", in its popular signification applies as well to connections of the wife as of the husband. *Held* there is nothing in the will in question, which confines the term to the testator's own relations, excluding those of his wife. **Radha Rukminamma v. Narasimha Row**, 17 M.L.J. 186=2 M.L.T. 340.

SUBRAHMANIA Aiyar and MILLER, JJ.

- (5) *Adoption during wife's pregnancy.*

The fact that, at the time of making an adoption, the wife of the adopting father is pregnant, does not affect the validity of the adoption. **Daulat Ram v. Ram Lal**, A.W.N. (1907), 57=29 A. 310.

BANERJI, J.

References:—3 M. 180, 12 B. 105. F.

- (6) *Gift by widow of portion of property inherited from husband*—Subsequent adoption—Suit by adopted son—See *LIMITATION ACT*, No. 109, 4 A.L.J. 354.

- (7) *Power to adopt given by will to widow of testator*—Disposition of family property, failure of, owing to birth of a son to testator's brother—Validity of adoption—See *HINDU LAW (JOINT FAMILY)*, No. 5, 11 C.W.N. 769. (P.C.).

Hindu Law.—(Continued).**—3.—(Alienation).**

(1) *Daughter's estate—Mitakshara—Mortgagee Auction-purchaser and reversioner, contest between—Onus of proof—Necessity—Litigation, costs of—Right, title and interest, passes when—Re-imbursement—Limitation—Res judicata.*

Per *Mookerjee J.*—Under the law of the Mitakshara, the estate of a daughter is a limited and restricted interest only, and the limitation and restriction must be taken to be of the same description as applicable to the case of a Hindu widow in an estate inherited from her husband (a).

Where the dispute is between the mortgagee-auction-purchaser on the one hand, who may be supposed to have personal knowledge of the transactions and the surrounding circumstances at the time they took place, and the reversioner on the other, who was an infant at the time of the transactions and who has no personal knowledge whatever of the condition of the family when the loans are alleged to have been advanced, the burden of proof is upon the mortgagee to establish the validity of the transactions which form the foundation of his title.

In order to establish necessity, it is to be proved that there were no funds in the hands of the limited owner sufficient to meet the demands on the estate (b).

Though costs of litigation are a recognised head of necessity, this does not mean that a widow engaged in litigation has an unlimited power of borrowing. For the purpose of determining whether or not there is legal necessity justifying an alienation by the widow, either by way of mortgage or sale, the creditor must show that the necessity actually existed, that the money was required for the purposes of a litigation, and that there was no other fund applicable in priority to the particular purposes (d).

*The test to be applied in order to determine the exact interest which passes at a sale in execution of decree against a Hindu widow or a qualified proprietor similarly situated, is whether the suit in which the sale was directed was one brought against the widow upon a cause of action personal to herself or one which affects the whole inheritance of the property in suit. It is important to consider the form of the suit and to construe whether the suit is

Hindu Law.—(Continued).**—3.—(Alienation).—(Continued).**

framed so as only to claim a personal decree against a limited owner or a decree which binds the entire inheritance (c).

Though the necessity for the loan is established, before the creditor can enforce the contract in its entirety, he must establish the necessity for interest at an unusual rate (f).

Where a person seeks to impeach and avoid a transaction on the ground that it was entered into by a person clothed with a qualified right of alienation in excess of his powers, he can be allowed to do so only upon re-imbursement of the advantage, if any, which he may have obtained under it (g).

Where the widow is dispossessed by virtue of any alienation or other act of ownership of her own, her act, being effectual for her own life, is not adverse to the reversioner till her death and does not call upon him to bring any suit till then (h).

^o Where a decree has been obtained upon a fair trial in a suit against a Hindu widow, that decree is effectual and operative as against the reversioner, unless the decree can be successfully impeached on some special ground. Such a decree operates as *res judicata* only in respect of questions tried in the suit. In a suit to enforce a mortgage against the executant, who is a qualified owner, no question could arise as to whether or not the mortgage was executed under circumstances of necessity which made it binding upon the estate in the hands of the reversioner. Where the decree in the mortgage suit was based upon a compromise, such compromise could not bind the reversioner (i).

Quære.—Whether a Hindu widow can delegate all her powers in relation to the estate to an agent, so as to bind the inheritance by the acts of the latter. **Roy Radha Kissen v. Nauratan Lall**, 6 C.L.J. 490.

BRETT and MOOKERJEE, JJ.

References:—(a) 6 I.A. 15=4 C. 741=3 C.L.R. 465, *relied on*, (b) 24 I.A. 183=24 C. 189=1 C.W.N. 697, *relied on*, (d) 6 Bom. L.R. 628, *F'*; (e) 7 C. 357, *F'*; (f) 18 C. 311=18 I.A. 1, 12 I.A. 47=11 C. 379, 34 I.A. 72=5 C.L.J. 344=29 A. 331=11 C.W.N. 474=4 A.L.J. 232=17 M.L.J. 233=9 Bom. L.R. 591; 5 C.L.J. 542, *R*; (g) 9 W.R. 108, 20 W.R. 187=11 B.L.R. 416, 8 M. 92, 5 B. 450, *Appl.*; (h) 8 C. 442, *relied on*; (i) A.W.N. (1907), 151. *F'*.

Hindu Law.—(Continued).**—3.—(Alienation).—(Continued).**

- (2) *Mitakshara—Mortgage by father, not for legal necessity and not for immoral purpose—Suit against father and son—Decree—Mortgage-decree against father's share only—Money-decree against son.*

In a suit to enforce a mortgage-bond executed by a Mitakshara father, in which the mortgagor's son was made a party defendant, it was proved that there was no legal necessity for the loan, that the lender did not make any enquiry as to the purpose of the loan, and the son failed to establish that it was contracted by the father for illegal or immoral purposes. *Held* the plaintiff mortgagee was entitled, in the first place, to have his security enforced as against the share of his mortgagor, and also to a decree which would enable him to realise his dues by sale of the share of the son in the ancestral property (a).

The rule of law laid down by the Full Bench in (a) is not inconsistent with, and has not been over ruled by, the subsequent decisions of the Judicial Committee in *Nanomi Babuasin v. Modun Mohun* (b), *Bhagbut Prosad v. Girja Koer* (c).

Definition of "antecedent debt" in *Khaliul Rahman v. Govind Pershad* (d) approved. **Kishun Pershad Chowdhry v. Tepan Pershad Singh**, 11 C.W.N. 618=5 C.L.J. 569=34 C. 735.

MOOKERJEE and HOLMWOOD, JJ.

References:—(a) 5 C. 855 (F. B.). *F.* (b) 13 C. 21=13 I.A. 1, *R.* (c) 15 I. A. 99, *R.* (d) 20 C. 328 *Appr*; 11 C.W.N. 294=34 C. 184, *Diss.*

- (3)—*Right of Mitakshara son to set aside alienations of ancestral property made by father prior to son's birth—Mitakshara son, right of redemption—Amendment of plaint—Inconsistent reliefs.*

If a Mitakshara son, claiming a joint interest, wishes to contest the validity of mortgages of ancestral properties, effected by the father or grandfather prior to his birth, he must show that such an interest vested in him at his birth or by his birth.

Quere:—If the mortgage property remains unsold at the birth of the son, whether the son acquires a right to redeem.

The Court refused to amend a plaint of a Mitakshara son, who, in his suit, sought to set aside mortgages effected by his father and

Hindu Law.—(Continued).**—3.—(Alienation).—(Continued).**

grandfather prior to his birth, by adding to it a prayer for redemption. **Bholanath Kissen v. Kartick Kissen Daskhettry**, 11 C.W.N. 462=34 C. 372.

CHITTY, J.

References.—6 I.A. 88 (P.C.), 3 B.L.R. 31 (F.B.), 17 I.A. 194 (P.C.), *D.*

- (4) *Grandfather paying income of certain joint family property to his daughter—Grandson not objecting—Estoppel—Mitakshara I-i-27.*

Where a grandfather merely credited to his daughter in his accounts some of the joint family property, and paid to her the income derivable from it, but the property itself was not severed from the joint estate, the fact that his minor grandson did not make a public protest against his grandfather's payment during his grandfather's lifetime, would not estop him from contesting the validity of an alienation made of the corpus of such property subsequently.

The text in Mitakshara I-i-27 cannot be held to authorise the setting apart of a considerable portion of the family property, whether moveable or immoveable, and the partition of it among the ladies of the family (a). **Kungill Kamakshi Ammal v. Bappula Chakrapani Chettiar**, 17 M.L.J. 405=30 M. 452.

BORDAM and MILLER, JJ.

References:—(a) 29 B. 51, 24 B. 547, 22 M. 113, *D.*

- (5) *Specific Relief Act (I of 1877), S. 42—Hindu Law—Gift by Hindu widow in favour of daughter—Sale by one sister to another—Surrender of estate—Cause of action—Reversioner.*

Where a Hindu widow, in possession of her husband's estate, transferred portion of this property to her daughters by deeds of gift or sale, and one of these daughters subsequently conveyed the portion so transferred to her to one of her sisters, *held* that these transfers did not afford any cause of action to a daughter's son, the next presumptive reversioner, to maintain an action for a declaration that the transfers were made without legal necessity and would not be binding beyond the life-time of the widow. **Tulsha v. Baru**, 4 A.L.J. 677=A.W.N. (1907) 260.

AIKMAN, J.

Hindu Law.—(Continued).**3.—(Alienation).—(Continued).**

Reference:—11 A. 258, F.

- (6) *Alienation of self acquired property by father—Son's right to question the validity—Testamentary disposition by a joint undivided member of Hindu family—Partition after bequest, but before the death of testator—Validity of the bequest.*

A Hindu father is competent to alienate the self-acquired property, in any way he chooses, to the prejudice of the son's right of succession, and the son is not entitled, under Hindu Law, to control his father's power of disposition (a).

A member of an undivided Mitakshara family cannot bequeath even his own share of joint property, because at the moment of death the right of survivorship is at conflict with the right by devise. Then the title by survivorship, being the prior title, takes precedence to the exclusion of that by devise.

But, where an undivided member of a joint Hindu family bequeathes his share of property and a partition of the property is made subsequent to the execution of the will, but before the death of the testator, the bequest is valid (b). *Sohan Lal v. Labhu Ram*, 150 P.R. 1907.

RATTIGAN and SHAH DIN, JJ.

References:—(a) 20 A. 267 (P.C.), R. (b) 103 P.R. 1894; 18 C. 157 (P.C.), 153 distinguished, 153 P.R. 1883, R.

- (6-a) *Suit by mother for declaration that ancestral property in father's hands is liable for the marriage expenses of their daughter—Right of alienees.*

Marriage expenses of a daughter are a legally enforceable charge on the ancestral properties in the father's hands according to the customary Hindu Law (a).

The father cannot be allowed with impunity to alienate such properties with the clear motive of defrauding his daughter's claims (b).

The same principles should be applied to alienations, which are intended to defeat the unmarried daughter's rights, to be provided with the usual expenses at her marriage, out of the family property as to the wife's or widow's rights for maintenance against alienees who are mere volunteers or who conspired with the father to defeat the daughter's claims (c).

A suit would lie by a Hindu mother, as guardian, of her minor daughters, for a declaration that such ancestral properties, in the

Hindu Law.—(Continued).**3.—(Alienation).—(Concluded).**

hands of the father's alienees, are subject to the obligation to provide sufficient funds for the reasonable expenses of her daughters' marriages, when they arrive at marriageable ages,—except in so far as such alienation is founded on a valuable consideration (a).

But in such a suit the court is not bound to fix the exact amount which might be required for such expenses, at the time of the marriage. (c) *Minakshi Anandam v. Subramonian Arumukha Nainar*, 22 T.L.R. 74.

SADASIYA AYYAR, C.J., and HUNT, J.

References:—(a) 23 M. 512; 6 A. 632; 11 A. 220, F. 26 M. 512, dissented from. (b) 2 A. 315; 5 B. 99; 23 A. 83, F; 3 T.L.R. 38, Expl. (c) 18 T.L.R. 218, R and F. (d) 16 M.L.J. 312=28 M. 57, R. (e) 6 A. 617 and 6 T.L.R. 37, F.

(6-b) *Right of a co-widow to alienate her share obtained by partition with other co-widows—right of surviving co-widows on alienor's death—See HINDU LAW (SUCCESSION), No. 1, 9 Bom. L.R. 1049.*

(7) *Alienation by Hindu widow of husband's self-acquired property—Right of reversioners to question its validity—See ACT XVIII OF 1894 (PUNJAB COURTS), No. 9, 114 P.R. 1907.*

(8) *Arroras of Tahsil Chawkal, Jhelum District—Hindu Law—Alienation of ancestral property by sonless proprietor to sister's son—See CUSTOMS (PUNJAB), No. 38, 115 P.R. 1907.*

(9) *The alienation by one of two co-widows is not ipso facto invalid—See HINDU LAW (REVERSIONERS), No. 4, 30 M. 3.*

(10) *Dayabhaga School—Right of mother to dispose of by will property given to her at partition between her sons—See CIV. PRO. CODE, No. 106, 11 C.W.N. 239.*

(11)—by widow—*Suit by reversioner to recover property—Limitation—See LIMITATION ACT, No. 75, 8 Bom. L.R. 675=81 B. 1.*

4.—(Ceremonies)

(1) *Expenses for—to be set apart in a partition—See HINDU LAW (PARTITION), No. 5, 8 Bom. L.R. 632=81 B. 54.*

5.—(Conversion).

(1) *Apostacy—Regulation VII of 1832, S. 9—conversion before Act XXI of 1850—female*

Hindu Law.—(Continued).**3.—(Conversion).**—(Concluded).

—right to enter into a compromise—Award against a Hindu widow or daughter—Reversioners, right of—Family arrangement.

A compromise made by a limited owner such as a Hindu widow or daughter is not binding on the reversioners, even though it has been followed by a decree of Court, nor is a decree on an arbitration award, one of the parties to the submission having been a widow; and the reversioners can be bound, only by decree made, after full contest, in a *bona fide* litigation.

R became a Mahomedan in 1845. He had a son D, who died a Hindu in R's lifetime, leaving two daughters. R died in 1851, leaving a daughter. At the time of his death, he was in possession of property. The daughters of D entered into a compromise with the son of R's daughter, by which they divided the property with him. *Held*, that R, having become a Mahomedan, ceased to have any interest in the property after his conversion. The property passed to his son, on whose death it was inherited by his daughters. Regulation VII of 1832 did not abrogate the Hindu Law as to the consequences of apostacy and, moreover, Act XXI of 1850 having come into force after R's conversion in 1845, had no effect on the rights of the convert.

Held, further, that the daughters of D had no more power to enter into the compromise than a widow would have had. There not having been any litigation ending in a decree of Court passed after full contest, the sisters exceeded their powers as limited owners making such compromise, and that, even if the compromise be regarded as a family settlement of doubtful claims, it was not within the sisters' powers to enter into it, so as to bind the reversioners. **Gobind Kishna Narain v. Khunni Lal**, 4 A.L.J. 365 = A.W.N. (1907), 151 = 29 A. 487.

STANLEY, C.J., and BURKITT, J.

References:—6 C.L.R. 81, (P.C.), 10 C.L.R. 327, 5 Bom. L.R. 885, 8 A. 365, 4 A.L.J. 160, 1 White and Tudor's Equity Cases 230, R.

(2) Apostacy of wife—Rights of Hindu husband—Decree for custody of wife or restitution of conjugal rights—See HINDU LAW (MARRIAGE), No. 2, 49 P.R. 1907.

(3) Christian converts from Hinduism may form a Co-parcenership—See CONVERTS, No. 1, 8 Bom. L.R. 770 = 31 B. 25.

Hindu Law.—(Continued).**6.—(Debts).**

(1) Mortgage by karta of a Mitakshara family—Suit against karta and sons—Hindu law—Antecedent debt.

Where a mortgage has been executed by the karta of a family governed by the Mitakshara law, the sons cannot set up their rights against the mortgagee, unless they are able to prove that the money, in respect of which the mortgage has been created, was borrowed by the father for immoral purposes.

To make the sons liable, it is not necessary to show that the debt secured by the mortgage was an antecedent debt of the father.

Surja Prasad v. Golab Chand (27 C. 762) and *Suchman Das v. Giridhar Chowdry* (5 C. 855) are not binding authorities, in view of the decision of the Privy Council in *Musst. Nanomi Babuasin v. Modun Mohun* (13 I.A. 1) and *Bhagbut Persad v. Girja Koer* (15 I. A. 99).

The limitation applicable to a suit brought by the mortgagee, as against the father as well as the sons, is that provided by Art. 132 of Sch. II of the limitation Act. **Moheshwar Dutt v. Kishun Singh**, 11 C.W.N. 294 = 34 C. 184 = 5 C.L. J. 441.

BRETT and SHARFUDDIN, JJ.

References:—20 C. 328, 29 M. 200, R.

(2) Interest Act (XXIII of 1839)—Contract Act (IX of 1872)—Debtor wrongfully withholding payment—Demand of payment by creditor—Interest—Hindu law.

Neither the Interest Act nor the Indian Contract Act affects the rule of Hindu law that in the case of a debt wrongfully withheld, after demand of payment has been made, interest becomes payable from the date of demand by way of damages. That law was in force, when the Interest Act was passed, and, under the proviso to the section of the Act, it has continued to be in force. The Indian Contract Act has not interfered with that law. **Saundanappa Andanappa v. Shivabacawa Amingowda**, 9 Bom. L.R. 439 = 31 B. 354.

CHANDAVERKAR and PRATT, JJ.

(3) Son's liability for father's debts as surety—Antecedent debt—Father's powers.

Although a debt created by the father as a surety is binding on his sons (a), yet the father has no authority to alienate their shares by sale or to charge them by a mortgage. The debt may be binding on the shares of the sons as a

Hindu Law.—(Continued).

——6. (Debts).—(Continued).

money debt (b); and where the debt, in respect of which the property was charged, was not an antecedent debt, but was a debt first incurred at the time when the mortgage was created, a decree in a suit on the mortgage should not charge the debt on the shares of the sons of the mortgagor in the mortgaged property. **Raghunath Addaikka Patter v. Natesa Pillai**, 17 M.L.J. 283.

BENSON and BODDAM, JJ.

References :—(a) 11 M. 373, R.; (b) 21 M. 28, 29 M. 200, R.

(4) *Manager—Debts for the family concern—Liability of sons to pay the debt.*

The father, being the managing member of a joint Hindu family which consisted of himself and his four sons, contracted a debt in the course of his dealings relating to the joint family concern and for the purposes of that concern. He was assisted in his business by three of his sons (defendants Nos. 1–3): the fourth son was a minor. After his death, the creditor brought a suit against all the four sons to recover the amount from them :—

Held, that the estate of defendants Nos. 1–3, as well as their person were liable to pay the debt while the share of defendant No. 4 in the family property alone was liable (a). **Gokul Kastur v. Amarchand Jasraj**, 9 Bom. L.R. 1289.

CHANDAVARKAR and KNIGHT, JJ.

Reference :—(a) 22 M. 166, Doubted.

(5) *Mitakshara school—Decree for mesne profits against father—Debt not illegal or immoral—Son's pious obligation to pay.*

Under the, Mitakshara, a son is under a pious obligation to discharge a decree for mesne profits obtained against his father by a person whom the latter wrongfully kept out of possession of immovable property. **Peary Lal Sinha v. Chand Charan Sinha**, 11 C.W.N. 163 = 5 C. L.J. 80.

RAMPINI and MOOKERJEE, JJ.

(6) *Widow carrying on business of husband—Death of widow—Liability of reversioners for trade debts incurred by widow.*

Trade debts properly incurred by a Hindu widow, on the credit of the assets of the business, to which she has succeeded as the heiress of her deceased husband, are recoverable, after her death, out of the assets of the

Hindu Law.—(Continued).

——6. (Debts).—(Continued).

business, as against the reversioners, who have succeeded thereto, even in the absence of a specific charge. **Radha Kishan v. Janki**, A.W.N. (1907), 155.

STANLEY, C.J., and BURKITT, J.

Reference :—26 B. 206, F.

(7) *Joint Hindu family—Liability of sons in respect of a mortgage executed by the father—Exemption of sons' interest—Subsequent suit against sons for share of debt payable by them—Liquidation Act, Sch. II, Arts. 147, 132, and 120.*

Certain joint ancestral property was mortgaged by the head of the family, first, in 1882, and, again, in 1893. Subsequently, the second mortgagee redeemed the first mortgage. The second mortgagee then sued to recover the amount due on both mortgages by sale of the mortgaged property, and obtained a decree in March, 1895, and an order absolute for sale on the 25th of October, 1897. To this suit the sons and grandsons of the mortgagor were not made parties. The sons and grandsons of the mortgagor sued for and obtained a decree exempting their interests in the mortgaged property from the operation of the mortgagee's decree. The mortgagee then sued the sons and grandsons to recover from them a proportionate part of the amounts due on his mortgage. This suit was instituted on the 6th of April, 1904.

Held, that the mortgagee's suit against the sons and grandsons of the mortgagor was maintainable, and that it was not barred by limitation, the rule applicable being either Art. 147 or Art. 132, and not Art. 120, of the Limitation Act, 1877. **Ram Singh v. Sobha Ram**, A.W.N. (1907), 159 = 4 A.L.J. 424 = 29 A. 544.

STANLEY, C. J. and BURKITT, J.

References :—15 A. 75, 28 A. 518, 22 A. 807, D; 21 A. 301, 11 M. 413, F.

(8) *Debt due by father of joint Mitakshara family—Son impleaded as party after the father's death—Objection to the legality of the debt taken in execution proceedings.*

When, on the death of a member of a joint Mitakshara family, the son was brought on the record of a suit, as his legal representative, for the recovery of the debt due from the deceased, and the Court passed a decree declining to consider the alleged immoral nature of the debt, as it did not arise in the suit against the

Hindu Law.—(Continued).**—6.—(Debts).—(Concluded).**

father the son would be entitled to raise the question of the legality of the debt in execution proceedings. **Nathu v. Amir Chand**, 147 P.R. 1907.

REID, J.

Reference :—11 C.W.N. 593 (F.B.). applied.

(9) Liability of son to pay father's debts—Son brought in as legal representative of father in execution—Question of liability of ancestral property may be gone into in execution—No separate suit necessary—See CIV. PRO. CODE, No. 110, 11 C.W.N. 593.

—7.—(Gift).

(1) *Gifts to daughters by way of marriage portion—Gift made by brother to sister who was not provided with marriage portion by father—Validity of.*

A Hindu father is entitled to make gifts, by way of marriage portions to his daughters, out of the family property, to a reasonable extent.

Those passages in the Mitakshara (I, VII, 6—14) which were held in *Ramaswami Ayyar v. Venguduswami Ayyar* (22M. 213) to authorise a qualified owner to make, out of the family property, customary marriage gifts of land, expressly direct brothers to provide for the marriage of the maiden sisters (a).

If a brother finds that his sister, though married in his father's life-time, has been, for any reason, left without a marriage portion, which she ought to have received, he will be within his powers, if he makes good the deficiency out of the family property. Such a gift, once made, cannot, therefore, be re-called by him or avoided by his son. **Kudutamma v. Narasimha Charyulu**, 17 M.L.J. 528.

WALLIS and MILLER, JJ.

Reference :—(a) 22 M. 113, R.

(2) Gift to daughter by sole male member—Amount of gift—Validity of gift—See HINDU LAW (JOINT FAMILY), No. 5, 11 C.W.N. 769.

(3) Will—Bequest to daughter and after her death to sons born of her womb equally—Construction—See ACT X of 1865 (SUCCESSION), No. 7, 12 C.W.N. 44.

—8.—(Guardianship)

(1) *Mother, guardian of minor son—Right to collect debts due to son—Whether appointment as guardian by Court necessary—Succession Certificate.*

Hindu Law.—(Continued).**—8.—(Guardianship).—(Concluded).**

In the absence of a male co-parcener capable of managing the family affairs, the mother is, by the Hindu Law, the guardian of her minor son's property, and as such entitled to get in the debts due to him; and it is not necessary for her, to obtain an appointment from the Court. She cannot obtain a Succession Certificate, as she is not claiming to be entitled to the effects of a deceased person, but only claims to recover the property of her son. **Robert Stanes v. Gopal Naicker**, 2 M.L.T. 246.

MILLER, J.

(2) Father's power to appoint guardian to son—See CIV. PRO. CODE, No. 230, 9 Bom. L. R. 553.

—9.—(Impartible Estates).

(1) Mortgage of impartible zemindari by holder and members of his family standing in the line of succession to the zemindari—*Spes successionis*—See TRANSFER OF PROPERTY ACT, No. 1, 2 M.L.T. 167.

—10.—(Inheritance).

(1) *Goshain—Girhast—Posthumous chela—Appointment by wife—Community, consent of—Effect of.*

A *chela* of a Goshain after he has served the *Joti* for a year may be made a *Sat-shishya* (virtuous approved pupil), if the *Joti* thinks him worthy of the honour, and the pupil, who has not become a *Sat-shishya*, can never inherit. A person who has had no association with his spiritual guide (in this case a *Girhast* Goshain) cannot be his *chela* and, therefore, a posthumous *chela* is a contradiction in terms. The sons of a Goshain cannot be excluded from inheriting his property by any *chela*, who may be appointed by his widow after his death.

Clearer evidence of the antiquity of a custom, whereby the sons of the owner of the property are deprived of their right, by the appointment of a posthumous *chela*, is required before legal recognition could be given to it. **Chhajju Gir v. Diwan**, 3 A.L.J. 717 = A. W.N. (1906), 289 = 29 A. 109.

STANLEY, C.J., and KNOX, J.

References :—14 M.I.A. 71, 14 M.I.A. 570, 28 C. 608 and 4 C. 543, R.

(2) *Preference between daughter's daughter's son and daughter's son's son—Alternative claim of gift and inheritance, validity of.*

Hindu Law.—Continued).**-10—(Inheritance).—(Continued).**

The daughter's daughter's son is within the line of heritable *bandus*, but he must be postponed to a daughter's son's son. The preference may legitimately be extended so as to prefer, all other considerations being equal, the claimant between whom and the stem there intervenes only one female link, to that claimant who is separated from the stem by two such links.

A person basing his title on an alleged gift, is entitled, if he failed to prove the alleged gift, to fall back upon his title as heir of the last male owner. **Tirumala Charlar v. Anandamal**, 17 M.L.J. 285. = 2 M.L.T. 347 = 30 M. 406.

WHITE, C.J., and MILLER, J.

Reference:—17 M. 182. R.

- (3) *Separate property of grandfather—Right of inheritance of separated son and grandson—Effect of partition.*

A partition resolves joint rights into several rights. It frees so much of the estate as falls to the lot of the father from any proprietary right on the part of the lot of the divided son, but it does not annul the filial relation, nor the right of succession which, in the absence of disqualification, is incidental to that relation (a). Therefore, it cannot be held that a partition annuls the relation of a grandson or the grandson's right of succession incidental to that relation, unless it be upon the ground that the right of representation cannot, under the Hindu Law, exist where there is no existing joint family. Vignaneswara and other commentators in expounding the doctrine of representation, with reference to the partition of the ancestral estate, speak of "unseparated brothers" but it does not follow that the same doctrine ought not to be applied among separated brethren.

Although it may be that to allow a rule of succession *per stripes* in a separated family is to admit an exception to the rule of Hindu Law, by which inheritance devolves on the nearest sapinda, the exception is one, which necessarily follows from the exposition given by Vignaneswara of the rights of sons and grandsons in the estate of the grandfather; but this exception does not extend to cognate collateral relations, because they take only an "obstructed inheritance" (b).

Mitakshara gives to the grandson an "unobstructed" right by his birth to the separate property of his grandfather (c), and partition does

Hindu Law.—(Continued).**—10—(Inheritance)—(Continued).**

not annul it or convert it into an "obstructed right"; therefore the existence of a son cannot defeat it, although both son and grandson are separated from their ancestor and from one another. **Marudayi v. Doraisami Karambian**, 17 M.L.J. 275. = 30 M. 348.

WHITE, C.J., and MILLER, J.

References:—(a) 2 M. 184, F; (b) 16 M. 15 R; (c) 16 B. 56, R.

- (4) *Mitakshara, Bombay school—Stridhan inherited by daughter from her father—Devolution on her daughter.*

In the Bombay Presidency, under the Mitakshara, a daughter takes an absolute interest in the property inherited by her from her father, and such *stridhan* devolves on her daughter in preference to her son. **Gulappa Doningappa v. Tayawa Kempanna**, 9 Bom. L.R. 834, = 31 B. 453.

CHANDAVARKAR and PRATT, JJ.

References:—30 I.A. 202 and 30 I.A. 209, D.

- (4-a) *Paravar caste—Custom of inheritance a mixed system among them—Their law of inheritance personal—Evidence as to Custom—Limitation.*

Where the plaintiffs, a son and three daughters of, a deceased Parava, sued for a declaration of their title to one half of his self-acquired property on Oodukur as against the defendants, who were his Seshakars, on the ground that the custom among them was to equally divide a person's self-acquisitions between his children and Seshakars, and where the defendants, contended, *inter alia*, that their caste followed only Marumakavazhi inheritance and that the suit was barred by limitation, held,

that the customary law of inheritance of the paravars, that a person's self acquisition goes in equal shares to his children and Seshakars, was reasonable and proved to be ancient,

that in India, wherever a person may reside, the rule governing his inheritance is his personal law, and not the local law, where he happens to reside.

Evidence of the custom among the caste people generally in the district is valuable in such cases (a), but need not be confined to the particular village in dispute.

Hindu Law.—(Continued).

—10.—(Inheritance)—(Concluded).

It not being proved that the acquirer died within twelve years of the date of the suit, and the plaintiffs not having proved possession within 12 years before suit, their claim was barred. **Palpu Velayudhan v. Adicha Parvathi**, 22 T.L.R. 18.

S.D. SIVA AIYAR, C.J., and EAPPA, J.

References :—(a) 16 A. 223, 381, 382 & 383, *It.*

(5) Exclusion from inheritance—Leprosy whether disqualification—Reason of the rule—See **HINDU LAW (SUCCESSION)**, No. 7, 9 Bom. L.R. 1149.

(6) **Bunjahi Khatri** of Rawalpindi—Applicability of Hindu Law—Right of daughter's son to succeed in preference to collaterals—See **CUSTOMS (PUNJAB)**, No. 35, 102 P.R. 1907.

—11.—(Joint Family).

(1) **Hindu Law—Mitakshara—Joint family—Inheritance by survivorship and not by succession—Jurisdiction of District Judge under Act XIX of 1841 for protection of property in cases of succession—Material irregularity—High Court's jurisdiction to interfere in revision.**

Where a member of a Hindu family under the Mitakshara Law died leaving behind him his widow, a daughter by his first wife, and two brothers, and the brothers applied to the District Judge, under Act XIX of 1841, for an order declaring their title to the property, and directing that possession of the same be delivered to them on the ground that it was joint family property, to which the widow had no claim, and the District Judge passed an order accordingly; held on application by the widow, and setting aside the order of the District Judge, that,

(1) the provisions of Act XIX of 1841 cannot apply to the case of a Hindu family governed by the Mitakshara Law, according to which, the surviving members of a joint family take the property of the deceased by survivorship, and not by succession, and that the case was not one in which the District Judge had jurisdiction to take any action under the Act, but he should have left the parties to seek their remedy by a proper suit for establishment of their title.

(2) also, the District Judge acted in the exercise of his jurisdiction, supposing him to

Hindu Law.—(Continued).

—11.—(Joint Family)—(Continued).

have had it, illegally and with material irregularity, prejudicing the petitioner thereby.

(3) and also that the High Court had full jurisdiction in revision to set aside the order of the District Judge. **Sato Koer v. Gopal Sahu**, 34 C. 929 = 12 C.W.N. 65.

BETT and COXE, JJ.

References :—6 W.R. Mis. 53 (1866), *F*; and 4 C.W.N. Notes CCXVI (1900) and 10 M. 68, *R.*

(2) *Mortgage of an undivided interest of a co-parcener in—Mortgagee of undivided interest not entitled to declaration that thereafter the co-parcener shall hold in defined share and that he has a lien over the mortgaged share—Suit for setting aside the entire mortgage brought by one co-parcener—Remedy of the mortgagee in the case of a mortgage by a co-parcener of his undivided interest.*

Held that, where a mortgagee takes a mortgage from a co-parcener of his undivided interest in a joint-family, the mortgage is invalid and is liable to be set aside in a suit brought for the purpose by another co-parcener. No declaration should be given to the mortgagee, that the co-parceners shall in future hold the property in defined shares, and that the share of the mortgagor is subject to a lien in favour of the mortgagee, for repayment of the amount intended to be secured by the mortgage. The proper course for the mortgagee in such a case is to obtain a decree against his mortgagor personally and attach his interest in the property. **Saiyad Iltifat Rasul v. Sanwal Singh**, 10 O.C. 289.

CHAMIER, J.C., and SANDERS, A.J.C.

References :—12 B.L.R. 90, *D.* 15 A. 339, *R.*

(3) *Mortgage executed by the manager—Binding character of the deed on the minor co-parceners—Necessity must be proved—Practice—Raising of issues—Minors.*

Where a plaintiff comes into Court, alleging, that a mortgage has been executed in his favour, by one of the defendants, acting on behalf of himself and other defendants, some of whom are minors, and all of them constitute a joint family, it is incumbent upon the plaintiff to prove legal necessity for the mortgage, whether the minor defendants' guardian had pleaded the absence of such necessity or not.

Hindu Law.—(Continued).**—11.—(Joint Family).—(Continued).**

A manager of a joint Hindu family has authority to bind it by a mortgage or other alienation, only where such mortgage or alienation is for the benefit of the family, or where the mortgagee or alienee enters into the transaction with the manager, after having satisfied himself on *bond fide* inquiries, that there was a necessity for it binding upon the family.

It is the duty of the Court, where minors are concerned, to examine the pleadings, and raise such issues in regard to the minors, as may be called for by the legal aspects presented by the plaint or the pleadings. **Sheikh Chand v. Hiralal Shamlat**, 9 Bom. L.R. 1114.

CHANDAVARKAR and KNIGHT, JJ.

(4) *Suit on behalf of the family—All coparceners must join—Practice.*

Where there are one or more members of a joint Hindu family filing a suit in respect of the property of that family, it is essential that all the persons who compose the family should be joined as party-plaintiffs (a). **Naranji Vasanji v. Moti Govanji**, 9 Bom. L.R. 1126.

RUSSELL, AG. C. J., and KNIGHT, J.

References :—(a) 7 B. 217, 12 B. 158, 30 B. 477 = 8 Bom. L.R. 268.

(5) *Joint Mitakshara family—Power to adopt given by will which failed as to disposition of property—Adoption, validity of—Gift by sole male member for the time being to daughter—Power of manager if exceed—Provision for daughter—What amount sufficient—Privy Council—Practice—Interference with decision of Courts in India—Partition, suit for—Infant parties—Discretion of Court to refuse partition if not beneficial to infants.*

In a suit for partition on behalf of a minor, the principal defendant being also a minor, *held*, that the Courts in India were right in refusing to order partition, on the ground that it would not be beneficial to the infants concerned or to either of them.

Where the sole male member, for the time being, of a joint Mitakshara Hindu family died leaving a will, whereby he authorised the adoption of a son by his widow, and made a certain disposition of the family property, and the disposition failed owing to the birth of a son to his brother's widow after his death,

Hindu Law.—(Continued).**—11.—(Joint Family).—(Continued).**

Held, on a construction of the will, that the power to adopt was not a part of the plan for the disposition of the family property and was not dependent upon that plan having effect.

The fact that, on the birth of the son to the testator's brother, the property vested for the time being exclusively in him, was no bar to the son subsequently adopted to the testator by the latter's widow claiming a share in the estate (a).

A gift of G.P. Notes of the nominal value of Rs. 20,000, by the sole male member for the time being of a joint Mitakshara family to his daughter, was held by the first Court to be not justified by the circumstances of the case; but the Appellate Court held the same to have been justified, in view, amongst others, of the fact that the estate was large and the gift was made out of the income and not out of capital.

Held, that the question belonged to a class, in respect of which the Judicial Committee is always unwilling to interfere with the decisions of the Courts in India, and no sufficient reason had been shown why they should do so in the present instance. **Bachoo Hurkissondas v. Mankorebai**, 11 C.W.N. 769 (P.C.) = 6 C.L.J. 1 = 9 Bom. L.R. 646 = 17 M.L.J. 349 = 2 M.L.T. 295 = 31 B. 373.

LORD MACNAGHTON, SIR ANDREW SCOBLE.

SIR ARTHUR WILSON, JJ.

Reference :—(a) 3 I.A. 154 F.

(6) *Family business—Liability of minor member of family for trade debts—Separate property.*

Where a member of a joint Hindu family carrying on an ancestral family business, upon attaining majority, separates entirely from the family and the family business, and thereafter acquires separate property, such separate property cannot be made liable for the debts incurred by the family trading firm, but the interest of the separating member in the family property will alone be liable (a). **Bishambhar Nath v. Fateh Lal**, A.W.N. (1907) 1 = 4 A.L.J. 95 = 29 A. 176.

STANLEY, C.J., and BURKITT, J.

References :—(a) 22 M. 167, F; 1 B.H.C.R. Ap. L.I. 1 C. 475, 5 C. 806 and 26 C. 349. R; 5 B. 18 and 14 B. 189, *Distd.*

(7) *Ancestral family business—Liability of member of the family after severance of his connection with the family business.*

Hindu Law.—(Continued).

——11.—(Joint Family)—(Continued).

A member of a joint Hindu family carrying on an ancestral family business, upon attaining the age of majority, completely severed his connection with the family business; nor was it shown that he ever ratified any of the transactions entered into by the family firm. *Held*, that such member could, on the failure of the family business, only be made liable for its debts, to the extent of his interest in the joint family property. He could not be held personally liable. **Bishambhar Nath v. Sheo Narain**, A.W.N. (1907), 9=29 A. 166.

STANLEY, C.J., and BURKITT, J.

- (8) *Family business—Suit to recover a debt due to the firm—Parties to such suit.*

The managing members of a joint Hindu family, carrying on a joint family business, are not entitled to maintain a suit in their own names against debtors of the family, without joining with them in the suit, either as plaintiffs or defendants, all the other members of the family. **Shamrathi Singh v. Kishan Prasad**, A.W.N. (1907), 58=4 A.L.J. 194=29 A. 311.

STANLEY, C.J., and BURKITT, J.

References:—3 M. 234, 10 B. 32, 6 C. 815, 7 B. 221, 14 A. 524, 18 M. 35, 23 M. 193, R; 26 A. 528, D.

- (9) *Mitakshara—Nucleus of ancestral estate—Earnings of a member from Government service, if separate property—Throwing in to common stock—Onus—Will.*

When D, who belonged to a joint Mitakshara family, separated from his co-parceners, there was a considerable nucleus of ancestral property in his hand. Having entered Government service, he was also able, by the time he died, to save a fair portion of his pay and pension. He had with his bankers only one account for this as well as for the savings of the ancestral property, and when he purchased properties he did not in any way discriminate between the sources of his income, but blended them all in one general account. His sons, when they became of age to earn their own living, gave the pay they received to D with whom they lived and by whom they were supported:

Held—that this was strong evidence that there was but one common stock of the whole family into which each voluntarily threw what he might otherwise have claimed as self-acquired, and the property, purchased by or with the assistance of the joint funds, was joint family

Hindu Law.—(Continued).

——11.—(Joint Family)—(Continued).

property; that D had no power to dispose of such property by will; that when it appeared that there was a considerable nucleus of ancestral property and that the parties lived together as a joint family, the onus of proving that the subsequently acquired property of D was his separate estate was on those who asserted it. **Lal Bahadur v. Kanha Lal**, 11 C.W.N. 417 (P.C.)=5 C.L.J. 340=4 A.L.J. 227=2 M.L.T. 147=17 M.L.J. 228=9 Bom. L.R. 597=29 A. 244.

LORD DAVEY, LORD ROBERTSON SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

- (10) *Partition—Nucleus—Separate estate—Onus.*

In a suit for partition of the joint family property, where the family lived joint, in one house, and there was a nucleus of joint property, the onus is on the party setting up a case of separate estate. **Anandrao Ganpatrao v. Yasantrao Madhavrao**, 5 C.L.J. 338 (P.C.)=11 C.W.N. 478=2 M.L.T. 151=17 M.L.J. 184=9 Bom. L.R. 595.

LORD DAVEY, LORD ROBERTSON, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

- (11) *Self-acquired property—Devise of self acquired property to sons—Nature of sons' interest.*

Semble that property, which is the self-acquired property of a Hindu who has sons and grandsons and is devised by will to one of the owner's sons, remains after devolution, self-acquired property and does not become the joint property of the devisee and his sons (a).

Semble also that, where the sons of a Hindu father apparently members with their father of a joint Hindu family, took, under their fathers will, property acquired by him under the will of his father devised to them separately by name; but continued to live in the manner of a joint Hindu family, and treated, at all events, the immoveable property for a series of years, in all respects as if it were joint ancestral property, the property so devised remained separate property according to Hindu law (b). **Parsotam Rao Tania v. Janki Bai**, A.W.N. (1907), 77=4 A.L.J. 257=29 A. 354.

STANLEY, C.J., and BURKITT, J.

References:—(a) 10 B. 528, F.; 3 M.H.C.R. 50, 6 W.R. 71, diss. (b) 11 M.I.A. 75, 30 I.A. 189, R.

Hindu Law.—(Continued).

—11.—(Joint Family).—(Continued).

- (12) *Mitakshara*—Joint Hindu family—Ancestral property—Property inherited from maternal grandfather.

Held that a son in a joint Hindu family does not acquire by birth an interest jointly with his father, in property which the latter inherits from his maternal grandfather. **Jamna Prasad v. Ram Partap**, A.W.N. (1907), 211 = 4 A.L.J. 582 = 29 A. 667.

BANERJI and AIKMAN, JJ.

References :—27 M. 382, Diss. 25 M. 149, discussed ; 25 M. 678, 27 M. 300, 9 B. 483, R.

- (13) *Separation*—Claim in respect of property in possession of separated member—Burden of proof.

Where the members of a joint Hindu family have admittedly separated, a person claiming rights derived from one member of the family, in respect of property in the possession of another member, must show affirmatively that the property in question is still joint property, in which his transferor is entitled to an interest. **Sita Ram v. Gayeshwar Prasad**, A.W.N. (1907), 220 = 4 A.L.J. 528.

DILLON, J.

References :—3 C. 315, 7 B.H.C. A.C. 153, R.

- (14) *Suit against adult members*—Decree making the joint family property liable—Minor members, how far bound by such decree.

In a suit against the adult members of a joint family, the Court is competent to pass a decree making the whole family property, including the share of a minor, liable (a). The sale in pursuance of such decree is not a mere nullity.

A minor member of the family will have the right to sue for the recovery of his share, only if he first sets aside the sale before the expiry of the period of limitation. **Pondala Ramasamy v. Yana Jagannadha**, 17 M.L.J. 541.

WHITE, C.J., & MILLER, J.

References :—(a) 10 M. 285, 24 M. 689, 30 M. 324, R.

- (15) *Contract by a member of joint family*—to sell his share—Specific performance—Decree for possession—Parties to the suit.

A suit lies for specific performance of a contract, by a member of a joint Hindu family, to sell his undivided interest in the family property (a). As the purchaser, in such a suit, can only obtain possession by a partition of his vendor's share in the family estate, he must

Hindu Law.—(Continued).

—11.—(Joint Family).—(Continued).

make all the members of the family parties to the suit (b). **Thakur Rewa Singh v. Hardayal**, 3 N.L.R. 160.

BATTEN, A.J.C.

References :—(a) 2 N. L. R. 52, R; (b) 15 C. P. L. R. 156, R.

- (16) *Dayabhaga*—Joint property or self-acquisition—Money received at marriage by a member.

Money received by a member of a joint Hindu family at marriage is not joint family property. **Adhar Chandra Chatterjee v. Nobin Chandra Chatterjee**, 12 C. W. N. 103.

RAMPINI and SHARFUDDIN, JJ.

- (17) *Mitakshara*—Samskara—Marriage of a co-parcener—family purpose.

According to Hindu Law, a debt contracted for the marriage of a co-parcener in a joint Hindu family is binding on the other co-parceners as a debt contracted for a family purpose and therefore for the benefit of the family (a).

Under the *Mitakshara* as well as the *Mayukha*, the word "Samskara" ordinarily includes marriage. **Sundrabai Javji Dagdu v. Shy-narayan Ridkarna**, 9 Bom. L.R. 1366.

CHANDAVARKAR and KNIGHT, JJ.

Reference :—(a) 27 M. 206 Diss.

- (18) *Mitakshara*—Joint family—Karta or manager—Right to give a valid discharge for minor brother—See TORTS, No. 1, 6 C. L. J. 383.

(19) *Karta* in a joint family must be with the consent of adult members—Right of descendants of *karta* to carry on suit brought by him for recovery of property against trespasser—See CIV. PRO. CODE, No. 205, 10 O. C. 121.

(20) Simple money-decree against father—Objection to execution on sons—Fresh suit against sons instituted on strength of such objection—Estoppel—See CIV. PRO. CODE, No. 116, 17 M.L.J. 314.

(21) Suit by one member of a—for redemption—second suit by other members—See RES JUDICATA, No. 14, 3 A.L.J. 644 = A.W.N. (1906), 242 = 29 A. 1.

(22) Decree against manager—Binding character of decree on other members on what depends—See CIV. PRO. CODE, No. 197, 6 C.L. J. 362.

Hindu Law.—(Continued).**—11.—(Joint Family).—(Concluded).**

(23) Suit by managing members of a joint Hindu family firm—Non-joinder of other members—Refusal of application to be joined as plaintiffs, whether justifiable—Limitation—See Civ. Pro. CODE, No. 37, 149 P.R.1907.

(24) *Mitakshara*—Mortgage by manager—Sale by mortgagor of mortgaged property in execution of money decree—Transfer of Property Act, S. 99—Minor not bound by such sale—See MORTGAGE (REDEMPTION), No. 19, 4 A.L.J. 187.

-12.—(Maintenance.)

(1) *Suit by illegitimate son against natural father for maintenance*—Decree creating charge on joint family property—*Legitimate sons not parties to above suit*—*Their liability after father's death*—managing member, whether representative of joint family.

Where, by a decree for maintenance obtained by an illegitimate son in a suit against his natural father, the maintenance is charged on the joint family property of the father and his legitimate sons, the decree is binding on the legitimate sons, although they were not parties to the above suit; and they cannot oppose the execution of the maintenance decree by a sale of the property charged, on the ground that they are not bound by the decree, and that, on the father's death, the joint family property passed to them by survivorship, free of the charge. It is sufficient, in such a case, that the maintenance is made a charge on the joint family property (a). Further, where the managing member is sued for the purposes of charging the family property, he must be considered to be sued as a representative of the joint family, even if it is not so expressly stated in the plaint. *Subbanna Bhatta v. Subbanna*, 2 M.L.T. 83 = 17 M.L.J. 180 = 30 M. 324.

BENSON and WALLIS, JJ.

References :—(a) 10 M. 283, 24 M. 689, R.

(2) *Dayabhaga School*—Property given to mother at partition between sons—Mother's interest therein—Her right to dispose of the same by will—See Civ. Pro. CODE, No. 106, 11 C.W.N. 239.

-13.—(Marriage).

(1) *Marriage between a Hindu and a Burmese Buddhist woman, legality of*—Effect of charge of domicile.

Hindu Law.—(Continued).**—13.—(Marriage).—(Continued).**

A Hindu cannot contract a legal marriage, except with a woman of his own caste (a). Even if it were shown that the Hindu had changed his domicile, he would still be subject to the same personal law. *Maung Man v. Doramo*, 3 L.B.R. 244.

IRWIN, J.

References :—(a) 9 W.R. 552, 1 C. 1, 15 C. 708, 3 L.B.R. 228, F.

(2) *Rights of Hindu husband—apostasy of the wife*—Decree for custody of wife or restitution of conjugal rights—Law of the defendant not applicable.

The apostasy of one of the parties does not, in the case of Hindus *per se*, annul the marriage, and a Hindu husband is entitled to demand the custody of his wife and does not lose his rights over her, by the fact that she has renounced Hinduism and adopted Islam (a).

By Hindu Law, a marriage is indissoluble (b).

In Hindu law, as in all laws, the right of the husband is that his wife must live with him as wife, if he so wishes and if he has not lost this right, through some causes immanent in him or proceeding from him, calculated to render the enforcement of the right opposed to the principle of justice, equity and good conscience.

Such cases, where the plaintiff is a Hindu husband and the defendant is a Mahomedan convert and wife of the plaintiff, are not, properly speaking, cases of conflict of laws, so as to be governed by the law of the defendant. They must be governed by Hindu Law (c).

In every decree for custody of wife or restitution of conjugal rights, that the husband must refrain from cruelty is understood, and the Court will not insert in the decree any conditions which it could not enforce. *Jamna Devi v. Mul Raj*, 49 P.R. 1907.

JOHNSTONE and RATTIGAN, JJ.

References :—(a) 4 B. 330, 2 N.W.P. 300, 10 M. 218, 18 C. 264, 32 C. 871, I; 32 P.R. 1870 (Cr.) and 1 Norton's leading cases 12, Diss; 85 P.R. 1906 and 9 M. 470, Expl. (b) 4 B. 330 and 18 C. 264. I. (c) 10 M. 218, F; 10 B. 1, Expl.

(3)—*Hindu husband—Possibility of wife's safety being imperilled—Cruelty—grave matrimonial misconduct—Husband's right to restitution of conjugal rights—Justification for denial of.*

Hindu Law.—(Continued).**—13.—(Marriage).—(Continued).**

A Hindu husband took a low caste Hindu woman as his mistress, and brought her into the house to live with his wives and family. Serious disputes ensued, with the result that he expelled his first wife and son from the house. In a suit by the husband against his first wife for restitution of conjugal rights,

held, that (a) though the habits of Hindus and Europeans, with regard to the marriage state, so differ that it would be unsafe to say that whatever was a defence to an action of this nature in the case of a European would also be in every case a defence in the case of a Hindu, yet the Court is not bound, on a principle applicable to Europeans and Indians alike, to order the wife to return to her husband, when there is reasonable ground for apprehending that a return to him will imperil her safety;—*Per Harrington, J.*

(b) 1. the conduct of the husband in taking a mistress and expelling his wife and son from the house amounted to cruelty within the meaning of the law, which fully justified the wife in living separately from her husband, and would justify the Court in refusing him a decree for restitution of conjugal rights, and,

2. even if the conduct of the husband constituted a grave matrimonial offence short of cruelty, he would not be entitled to succeed.—*Per Mookerjee, J.* **Dular Koer v. Dwarka Nath Misser**, 34 C. 971.

HARRINGTON and MOOKERJEE, JJ.

References:—Indian cases:—11 M.I.A. 551, 615; 1 B. 164; 13 I.A. 126, 160; 5 C. 500; 14 W.R. 451; 8 A. 78; 32 C. 234; 4 A.H.C. 109; 17 W.R. 528; 24 W.R. 377, R; 5 C. 500, *Distd.*

English cases:—(1827) A.C. 395; (1790) 1 Hag. Con. 35; (1794) 1 Hag. Ecc. 766; (1860) 1 Sw. and Tr. 594; (1865) 4 Sw. and Tr. 135; 4 Sw. and Tr. 164; (1895) 72 L.T. 295; (1844-7) 3 Notes of Cases 324; (1861) 2 Sw. and Tr. 665. (1861) 2 Sw. and Tr. 303; (1865) 34 L.J. (P and M) 23; (1873) L.R. 7 Eq. 520; (1880) 5 App. Cas. 214; (1895) P. 315; (1896) P. 175; (1895) A.C. 384; (1895) P. 220; (1879) 5 P.D. 19, 23; (1755) 2 Lee 116 commented upon in (1897), A.C. 395, R.

(4) Debt for marriage of co-parcener, whether binding on another co-parcener—See HINDU LAW (JOINT FAMILY), No. 17, 9 Bom. L.R. 1866.

Hindu Law.—(Continued).**—13.—(Marriage).—(Concluded).**

(5) Bond in consideration of dissolution of marriage void as contrary to cardinal principles of—judicial separation and desertion—M.k. kathayi Vellalas governed by—See CONTRACT ACT, No. 1, 22 T.L.R. 18.

—14.—(Partition).

(1) *Hindu—Law—Dayabhaga and Mitakshara—Joint family—definition of shares—Partition.*

Unlike those governed by the Mitakshara, in families governed by the Dayabhaga, the mere ascertainment and definition of the shares of the members of a joint family give no indication of their having separated and effected a partition.

A *solenama*, by which the members of joint Hindu family, governed by the Dayabhaga, got their shares defined, did not effect a severance more especially, as it was a deed executed by brothers, and no distinct share was allotted to the mother. **Bata Krishna Goswami v. Gopal Krishna Goswami**, 5 C.L.J. 417.

RAMPINI and MOOKERJEE, JJ.

References:—30 I. A. 1 = 30 C. 231; 1 I.A. '55 = 12 B.L.R. 235; 5C. 474, 30 I.A. 139 = 30 C. 738; 25 M. 149; 11 M.I.A. 175; 9 W.R. 61; 8 M.I.A. 66; 15 W.R. 200; 11 W.R. 308; 15 W.R. 442; 9 C. 817; 30 I.A. 130 = 30 C. 724, *Refd. to.*

(2) *Mitakshara—Partition between uncle and nephews—Nephews joint tenants—survivorship.*

When a joint Hindu family, consisting of two nephews and an uncle, referred the matter in dispute between them to arbitration, and the arbitrators divided the property into two shares and allotted one to the uncle and one to the two nephews and it did not appear that there was any intention on the part of the nephews to separate *inter se*, *held* that the nephews remained joint tenants and did not become tenants-in-common, and, on the death of one of them, the other became the owner of the whole property by right of survivorship. **Durga Del alias Gulab Del v. Balmakund**, 3 A.L.J. 683 = A.W.N. (1906), 287 = 29 A. 93.

STANLEY, C.J. and RUSTOMJEE, J.

(3)—*Partition deed giving certain advantages to minor member of family—Right of person so benefited to sue on deed—Act No. I of 1877 (Specific Relief Act), S. 23 (c).*

Hindu Law.—(Continued).**13.—(Partition).—(Continued).**

By a deed of partition executed by the adult members of a joint Hindu family, it was agreed that a certain minor member of the family, represented in the execution of the deed by his father, should receive a certain share in a particular village "by right of primogeniture," and the agreement further recited that the member in question had been put into possession of the share allotted to him. It was further agreed that, inasmuch as the property thus dealt with was subject to two mortgages, the other members of the family would be responsible for the payment of the mortgage debts and would indemnify the recipient of the mortgaged property in case of proceedings being taken against such property for satisfaction of the mortgage debts.

Held, on suit by the minor (after attaining majority) to compel reimbursement by the other members of the family, that the partition deed was enforceable in favour of the plaintiff, just as much as, if just and equitable, it would have been binding upon him, and that the plaintiff was entitled to sue for any benefit which the deed purported to secure to him.

Held, also, on a construction of the partition deed that the plaintiff was also entitled to sue having regard to the terms of section 23 (c) of the Specific Relief Act, 1877. **Awadh Saruj Prasad Singh v. Sita Ram Singh**, A.W.N. (1906), 261 = 3 A.L.J. 785 = 29 A. 37.

STANLEY, C.J. and KNOX, J.

Reference:—30 I.A. 220, R.

(4) *Mother, share of—Reversion—Right to sue, survival.*

The right of the mother to a share of the father's properties, on a partition among the sons, is in lieu of maintenance, and such share, on her death, reverts to the sons. Where the mother brought a suit against the sons for her share of certain Government Promissory Notes, which had been partitioned amongst themselves by them;

Held, on her death, the right to sue did not survive in her executor. **Tripura Sundari Debi v. Dakhina Mohan Roy**, 5 C.L.J. 310 = 11 C.W.N. 698.

GHOSE and CASPERSZ, JJ.

References:—18 C. 386, F; 31 C. 467, R.

(5) *Expenses for ceremonies to be set apart—Step-mother, share of, on partition—Value*

Hindu Law.—(Continued).**14.—(Partition).—(Concluded).**

of stridhan to be deducted from the share—Expenses for prospective ceremonies of nephews and nieces not allowed.

In a partition between brothers and father belonging to a joint Hindu family, those who are not married, &c., are entitled to have a sum set apart from the family property sufficient to defray the expenses of the thread, betrothal and marriage ceremonies which have not been performed, the sum set apart being calculated according to the extent of the family property.

When sons in a joint Hindu family come to a partition of the family property, the step-mother is entitled to a share equal to the son's : but from that share must be deducted the value of any *stridhan* received by her as a gift from her father-in-law or her husband.

In a partition between brothers in a joint Hindu family, one of the brothers cannot claim any sum for the prospective ceremonies of his children. **Jairam Nathoo v. Nathoo Shamji**, 8 Bom. L.R. 632 = 31 B. 54.

SCOTT, J.

(6) *Joint Hindu family—Minor—Right of minor member of a joint family to sue for partition.*

Held, that a minor member of a joint Hindu family may institute a suit for, and obtain partition of, his share in the joint family property, if there exist circumstances, such as, in the interest of the minor, render it advisable that his share should be set aside and secured for him. **Bhola Nath v. Ghosi Ram**, A.W.N. (1907), 86 = 29 A. 373.

STANLEY, C.J. and KNOX, J.

(7) *Joint family property, partition of—Nucleus—Separate estate—Onus—See HINDU LAW (JOINT FAMILY), No. 10, 5 C.L.J. 388.*

(8) *Right of a co-widow to partition of her share—Effect of partition after co-widow's death—See HINDU LAW (SUCCESSION No. 1, 9 Bom. L.R. 1049.*

(9) *Partition between minors—Discretion of Court to refuse partition if not beneficial to minors—See HINDU LAW (JOINT FAMILY), No. 5, 11 C.W.N. 769.*

(10) *Divided son and grandson—Right to inherit to grandfather—Effect of partition—See HINDU LAW (INHERITANCE), No. 3, 17 M.L.J. 275.*

Hindu Law.—(Continued).**15.—(Religious Endowments.)**

- (1) *Construction of Hindu Will—Debutter, private endowment—Right of pala or turn of worship, if heritable and devisable—Alienation of right of worship.*

Under the present Hindu Law, alienation of the right to worship is allowed only when (1) it is in accordance with the wishes and intentions of the founder of the endowment or (2) it is justified by the usage or practice in the family. Originally, partition and alienation alike of the right of worship were forbidden. Custom and convenience, however, intervened, and the right to partition of a right of worship came to be recognised. **Rajessur Mullick v. Gopessur Mullick**, 11 C.W.N. 782 = 34 C. 328.

CHITTY, J.

References:—G Bom. H. C. R. A. C. J. 250, 6 B. 298, 17 C. 557, D.

16.—(Religious Matters).

- (1)—*Muth—Mohuntship—Succession Laskari Vaishnavas—Chela, nomination—Bhandara ceremony.*

In the *asthal* RAGHUBI CHAK *alias* RAMPATI of the Laskari Vaishnavas, on the death of a mohunt, a *chela* succeeds, if there is one, and, if there be more than one, a successor is appointed by the mohunt from among the *chelas*.

Where, therefore, a person was the only *chela* of the deceased mohunt and had been appointed to succeed his *guru* by the due performance of ceremonials and when he has performed the *sradh* and cremation ceremonies of the deceased, he is entitled to succeed as mohunt in preference to a *gurubhai* of the late Mohunt, even though the *bhandara* ceremony has not been performed by him. The *bhandara* is purely a formal ceremony which neither confirms nor creates title. **Satyadeo Das v. Santeke Das**, 5 C.L.J. 360.

MITRA and CASPERSZ, JJ.

References:—(1880) 1 Sel. Rep. 309 (N. Ed.), 414; 9 A. 1; 19 W.R. 215; 11 M.I.A. 405 (428), 7 C.W.N. 145, R.

17.—(Reversioners).

- (1) *Acceleration of reversioner's estate by gift by qualified owner.*

Where a widow transfers her interest in certain property to the next reversioner, subject to the condition that the donee should maintain the transferor and make certain other payments, the transaction is essentially an onerous

Hindu Law.—(Continued).**17.—(Reversioners).—(Continued).**

gift and, therefore, the alienation is one, the validity or invalidity of which was determinable with reference to the rules of Hindu Law, governing transfers by qualified female owners. It is not a mere withdrawal of her life interest, so as to accelerate the succession of the then reversionary heir, within the meaning of the rule laid down in *Behari Lal v. Madho Lal* (a). **Sreeramulu Naidu v. Andalammal**, 17 M.L. J. 14 = 30 M. 145.

WHITE, C.J., and SURRAMANIA IYER, J.

Reference:—(a) 19 I.A. 30 (P.C.) R.

- (2) *Reversioner, setting aside alienation by widow—Equities—Right to sue—Breach of duty by a third person—Equity with respect to property received as belonging to another.*

Where the plaintiff (reversioner) was ordered by the lower Court to repay Rs. 400, the amount of the purchase money received by plaintiff from the widow, as a condition precedent to recovering possession from the defendant (purchaser from the widow), the sale being invalid for want of necessity beyond the life-time of the widow:

Held, there was no equity in favour of the defendant and as against plaintiff, entitling that defendant to the amount of the purchase money.

An action will not lie at the suit of A, for the breach by B of a duty which B owed to C, because, in order to support an action, there must be either a contract with the person sued or some relation establishing a duty on his part towards the plaintiff (a).

Where a party receives from another goods or their value in money as belonging to a third party, with notice of that party's ownership, that third party can sue the receiver therefor (b). **Janki Dagder v. Mahadu Devji**, 9 Bom. L.R. 710.

CHANDAVARKAR and PRATT, JJ.

References:—(a) 18 C.B. 59, F. (b) 8 App. Cas. 874, F.

- (3) *Agreement between divided brothers as regards estate of a deceased brother—Widow of deceased not a party to the agreement—Transfer of Property Act, S. 6—Limitation Act, Art. 144—Specific performance.*

Three brothers S, R and K made a partition of their property, and S lived separate, though

Hindu Law.—(Continued).

17.—(Reversioners)—(Continued).

R and K lived together. After the death of R, leaving a widow and daughter, S and K agreed, as between themselves, that K should maintain R's widow and that a piece of land was to be given to his daughter, and that S was to get a small piece of land, K being in possession of the major portion of the land, and that ultimately after the widow's death, S and K were to divide the property between themselves. R's widow knew nothing about this agreement nor did she surrender her estate. S predeceased the widow and K survived her. After the widow's death, the son of S sued K's son for his share under the agreement.

Held, per White, C.J.—R's right on the date of agreement was only that of a presumptive reversionary heir, and this right could not be transferred under S. 6 of the Transfer of Property Act (a).

On the death of the widow, the party entitled to the property as reversioner was K, S having predeceased the widow. The plaintiff would not, therefore, be entitled to the share.

Per Wallis, J.—The two brothers were not in the position of expectant heirs and the agreement would, therefore, be enforceable. The plaintiff's right to possession only arose on the widow's death, and the suit is governed by Art. 144 of the Limitation Act.

Per Boddam, J.—The agreement conveyed no title to S. It was a mere agreement between two expectant reversionary heirs to divide when the reversion would fall in. The only remedy of the plaintiff would be to sue, within three years of the widow's death, for specific performance of the contract. **Sooraparaaju v. Veerabhadradu**, 17 M.L.J. 505 = 30 M. 486 = 2 M.L.T. 443.

WHITE, C.J., WALLIS and BODDAM, JJ.

- (4) *Effect, on reversioner, of decree obtained against widow without fraud or collusion—Validity of alienation by one of several widows.*

Where a debt, for which a decree was obtained against a co-widow in possession, is one binding upon the inheritance, the decree is, in the absence of fraud or collusion between the widow and the creditor, binding on the reversioner, though obtained without actual contest. The widow, as representing the estate, is not bound to raise any defence in the

Hindu Law.—(Continued).

17.—(Reversioners)—(Continued).

case, when satisfied that the debt is really due. Alienation by one of two co-widows is not *ipso facto* invalid with reference to the interest of the other co-widow or of other persons interested in the reversion. **Subbammal v. Avudaiyammal**, 30 M. 3.

SUBRAHMANIA AYYAR and BENSON, JJ.

References:—16 M. 1 (10), D; 14 M.L.J. 139, R.

(5) Reversioner taking property by gift from Hindu widow takes absolute estate—See HINDU LAW (WIDOW), No. 10, 12 C.W.N. 49.

(6) Reversioner if bound by act and covenant of widow in possession—High rate of interest, whether justifiable—Nature of widow's estate—See HINDU LAW (WIDOW), No. 15, 6 C.L.J. 462.

(7) Deed of gift by Hindu female—Reversioner's rights—See APPEAL (SECOND APPEAL) No. 1, 11 C.W.N. 956.

(8) Suit by presumptive reversioner to set aside will of last male owner—See SPECIFIC RELIEF ACT, No. 13, 30 M. 195.

(9) Alienation by widow—Suit by reversioner for recovery of property—Limitation—See LIMITATION ACT, No. 75, 8 Bom. L.R. 675 = 32 B. 1.

(10) Relinquishment by reversioners of their right of reversion—Expectancy—Effect—See HINDU LAW (ADOPTION), No. 3, 2 M.L.T. 184.

(11) Compromise by widow or daughter—Decree thereon—Award against widow or daughter—Effect on reversioners—See HINDU LAW (CONVERSION), No. 1, 4 A.L.J. 365.

(12) Right of daughter's son to impeach alienation by maternal grandmother of property inherited from her husband—Limitation—Privy of estate between reversioners—acceleration of reversioner's interest—See HINDU LAW (WIDOW), No. 2, 3 N.L.R. 35.

(13) Decree against widow how far binding on reversioners—*Ex parte* decree—Decree fairly and properly obtained—See HINDU LAW (WIDOW), No 6, 17 M.L.J. 160.

(14) Suit for possession—Plea of adoption—Limitation—See LIMITATION ACT, No. 94, 17 M.L.J. 182.

(15) Possession under will of Hindu female—Compromise by reversioners—See HINDU LAW (WILL), No. 4, 4 A.L.J. 273.

Hindu Law.—(Continued).**17. — (Reversioners).—(Concluded).**

(16) Effect of relinquishment of estate by Hindu widow in favour of next reversioners—Death of the next reversioners—See HINDU LAW (WIDOW), No. 9, A.W.N. (1906), 272 = 29 A. 71.

(17) Alienation by Hindu widow—Lease—Suit by reversioner to recover possession after widow's death—Reversioner not bound to set aside alienation—See LIMITATION ACT, No. 77, 11 C.W.N. 424.

(18) Mother's share on partition—Reversion—Right to sue, survival—See HINDU LAW (PARTITION), No. 4, 5 C.L.J. 310.

(19) Alienation by widow, without legal necessity, of her husband's estate—Reversioner's consent, effect of—See HINDU LAW (WIDOW), No. 17, 12 C.W.N. 74 (P.C.).

18. — (Self-acquisition).

(1) Earnings of a member from Government service when not self-acquisition—Throwing into a common stock—See HINDU LAW (JOINT FAMILY), No. 4, 11 C.W.N. 417.

19. — (Stridhan).

(1) *Mitakshara*—Partition—Share taken by step-mother on partition—*Stridhan*.

Held that the share in the property of her deceased husband, taken by a widow on partition between her and her step-sons, is her *stridhan*. **Gambhir Singh v. Makraddhu**, A.W.N. (1907), 206 = 4 A.L.J. 673.

BANERJI, J.

References:—24 A. 67, 24 A. 82, F. 25 A. 468, *Distd.*

(2) *Stridhan* inherited by daughter from father, devolution of—See HINDU LAW (INHERITANCE), No. 4, 9 Bom. L.R. 834.

(3) Funeral expenses of mother are a charge upon Son's estate—Mother's *stridhan* not liable—See HINDU LAW (SUCCESSION), No. 5, 9 Bom. L.R. 1187.

20. — (Succession).

(1) Co-widows—Right of a co-widow to partition of her Share—Share can be alienated.

Under the *Mitakshara*, as well as the *Mayukha*, it is the right of each of the co-widows to enjoy her deceased husband's property by partition *inter se*. She can assign her right to any one she chooses. If she has already obtained her share by partition, she can alienate that share. In either case, the assignment or alien-

Hindu Law.—(Continued).**20. — (Succession).—(Continued).**

ation cannot take effect or have validity beyond her life-time. It is good so long as she lives. On her death, her interest in the property ceases, and the share goes to the surviving co-widow or co-widows as the case may be. **Harl Narayan Jog v. Vital Naru Bhoale**, 9 Bom. L.R. 1049 = 31 B. 560.

CHANDAVARKAR and HEATON, JJ.

(2) Degraded woman—Prostitution—Dissolution of tie of kindred—Husband's rights to property left by—

By her degradation, a Hindu woman does not cease to be a Hindu, and the rule of succession to her property is the ordinary rule of Hindu Law. Where a wife left her husband and became a prostitute and died as such, held that her husband would succeed to her property. Prostitution does not sever the legal relation and the degradation of the woman in consequence of her unchastity does not entail the cessation of the tie of kindred between her and her husband's family (a). **Narayan Das v. Tirlok Tiwari**, 3 A.L.J. 537 = A.W.N. (1906), 243 = 29 A. 4.

BANERJI and AIKMAN, JJ.

References:—(a) 23 M. 171, F. 7 Select Reports, 273, not F. 1 A. 46, R.

(3) Woman of the town, sister's daughter—Heir.

A woman of the town, who is a Hindu by birth, does not cease to be a Hindu by reason of her degradation, and succession to her property is governed by the Hindu Law.

The sister's daughter of a deceased prostitute who has followed her into degradation is not her heir (a). **Sundari Dossee v. Nemye Charan Daw**, 6 C.L.J. 372.

FLETCHER, J.

References:—(a) 25 C. 254, F. 21 C. 697, *Diss.* 29 A. 4, R.

(4) *Murli*—Daughters—Married daughters and unmarried daughters, preference between—Place of unmarried daughter who has turned out a prostitute—*Mitakshara*—*Vyavahara Mayukha*—Act XXI of 1859.

According to Hindu Law, a woman, who, having never married, becomes a prostitute, is not an "unmarried" daughter of her father, entitled as heir to the whole of his property to the exclusion of his married daughters.

Hindu Law.—(Continued).**—20.—Succession.—(Continued).**

Such a daughter can inherit as heir in the line of daughters, only in the absence of the unmarried and the married daughters. **Tara Hari Shinde v. Krishna Bandu Shodke**, 9 Bom. L.R. 774=81 B. 495.

CHANDAVARKAR and BEAMAN, JJ.

- (5) *Mother succeeding to her son takes limited estate—Funeral expenses of mother are a charge upon son's estate—Mother's stridhan not liable to pay them.*

Under Hindu Law, a mother succeeding as heir to her son takes only a limited estate (a).

The duty of performing the funeral ceremonies of a mother (literally, offering the funeral oblations, *pinda dana*) is laid down as a religious injunction binding her son in absolute terms by the Hindu Law. The duty being laid upon him, as her son, independent of any assets left by her, he is bound to discharge it as a sacred obligation attaching to sonship. If he dies during her lifetime, the funeral expenses of the mother have to be defrayed out of his property and not out of her *stridhan*.

According to Vijnaneshwara, where an act is directed to be done, and the omission to do it is stated to be sinful, the direction imposes upon the person directed an imperative and absolute obligation to do the act. **Vrijbhukandas Dwarkadas v. Bai Parvati**, 9 Bom. L.R. 1187.

CHANDAVARKAR and HEATON JJ.

Reference :—(a) 6 Bom. H.C. 215, F.

- (6) *Grandson of mother's sister—Daughter of the son of the sister of the paternal grandfather—Priority between.*

Under Hindu Law, the grandson of the mother's sister (maternal aunt) of the propositus is entitled to succeed in preference to the daughter of the son of the sister of the paternal grandfather. **Bai Vijli v. Bai Prabhakshmi**, 9 Bom. L.R. 1129.

RUSSELL, AG. C. J., KNIGHT, J.

- (7) *Grandson of paternal uncle—Widow of a son of paternal uncle—Priority between—Exclusion from inheritance—Leprosy.*

The grandson of the paternal uncle of the propositus is entitled to succeed in preference to the widow of a son of a younger paternal uncle (a).

Under Hindu law, the reason for the disqualification of a man suffering from leprosy is

Hindu Law.—(Continued).**—20.—Succession.—(Concluded).**

that he must be in such a condition that the society of his fellowmen must be refused to him. A person suffering from an æsthetic or nerve type of leprosy is not, therefore, thereby excluded from inheritance. **Ranchod Naran v. Ajobai**, 9 Bom. L.R. 1149.

RUSSELL, J.

Reference :—(a) 16. B. 716. F.

- (8) *Vyavahara Mayukha—Succession—Daughter's inheriting non-technical stridhan of their mother—Several interest—Survivorship.*

Under the Vyavahara Mayukha, daughters succeeding to the non-technical stridhan of their mother take absolute and several interests, and not joint interests with right of survivorship. **Bai Rukhnani v. Keshavlal Ranchhod**, 9 Bom. L.R. 1293.

JENKINS, C.J., and HEATON, J.

Reference :—(a) 6 B. 85, F.

- (9) *Succession of daughter's sons after death of daughters—See HINDU LAW (WIDOW), No. 13 10 O.C. 159.*

- (10) *Succession of uncles of whole blood and half blood—Preference—See LANDLORD AND TENANT, No. 18, 6 C.L.J. 190.*

- (11) *Property inherited from maternal uncle—Whether nephew takes with benefit of survivorship—See TORTS, No. 1, 6 C.L.J. 383.*

—21.—(Survivorship).

- (1) *Survivorship among joint shebaites—See SHEBAIT, No. 1, 5 C.L.J. 527.*

—22.—(Widow)

- (1) *Decree against widow—No fraud—Reversioner bound—Civ. Pro. Code, Ss. 13, 244 and 331—Res judicata—Objection to execution by reversioner—Decree-holder directed to get a declaration against the reversioner—reversioner brought upon the record as judgment-debtor—former order, no bar.*

Where widows, in possession of their husband's estate, honestly contest a suit, and there is no fraud or collusion in the matter of obtaining the decree, which is passed against them, the decree is binding on the reversioners.

A decree was obtained against the widow of one B. The widows having died, the reversioner L. objected to the execution, although he was no party to the decree, and was not brought

Hindu Law.—(Continued).**—22.—(Widow).—(Continued).**

upon the record as a representative. The Court refused execution and ordered the decree-holder to get his title declared against L. The decree-holder did not bring any suit for declaration, but brought L upon the record as a representative of the widows. *Held*, that the decree could be executed against L, and the order directing the decree-holder to get his title declared against L, was passed without jurisdiction and did not operate as *res judicata*. The Court ought to have registered L's objection as a suit under S. 331, Civ. Pro. Code, and, not having done so, it acted without jurisdiction. **Lachmi Narain v. Ram Chandra**, 4 A.L.J. 117 = A. W.N. (1907), 64.

KNOX and RICHARDS, JJ.

(2) *Sale by widow of property inherited from her husband to son-in-law without legal necessity—Death of widow after son born to daughter—Mortgage by son-in-law—Son-in-law's possession adverse to daughter (his wife)—Suit by mortgagee against the daughter and her son after mortgagor's death—Limitation Act, Arts. 91, and 141—Finding operating as res judicata.*

A Hindu widow sold property inherited from her husband for valuable consideration, but without legal necessity, to her son-in-law, and died shortly after the birth of a son to her daughter. The son-in-law remained in possession of the property adversely to the daughter (his wife) and died after effecting a mortgage thereof. In a suit by the mortgagee against the mortgagor's wife and son, *held* that the daughter's right to question the sale and the mortgage was extinguished by lapse of time, but that the grandson's title as reversioner of his mother's father is in no way affected by the fact that his mother's rights have been extinguished (a1). Because, there is no privity of estate between one reversioner and another as such, and, therefore, an act or omission by one reversioner cannot bind another reversioner, who does not claim through him (a2):

Held, also, that the grandson's reversionary right has not been accelerated by the extinction of his mother's title during her life time (b).

Art. 141, and not 91, Limitation Act, applies, where a reversionary heir claims to recover possession from the alienee after a widow's death (c), and it will not be necessary for him to set aside either the sale or the mortgage mentioned above (d).

Hindu Law.—(Continued).**—22.—(Widow).—(Continued).**

A finding may constitute a *res judicata*, though not embodied in the decree (e). **Anand Rao v. Bansinath Brahman**, 8 N.L.R. 35.

DRAKE-BROCKMAN, OFFG. C.J.

References:—(a1) 23 B. 725, ~~AR~~; (a2) 6 C. 764, 27 A. 406, 32 C. 62, 28 M. 57, R; (b) 22 C. 445, 23 A. 448, 25 A. 435, R; (c) 6 I.A. 110, R; (d) 33 C. 257, R; (e) 11 C.P.L.R. 130, R.

(3) *Widow—Right of residence in the family house—Creditors of the individuals of the family cannot deprive the widow of her right of residence—Practice—Second appeal.*

A widow's right to residence in the house belonging to the joint Hindu family, in which her husband was an undivided co-parcener, cannot be affected by the enforcement of debts, which are, from the joint family point of view, improper, that is to say, not for the benefit of the joint family as a whole. The widow's right, when brought into conflict with the claim arising upon such a debt, has to be fixed by reference to the character of the debt, at the time it was incurred.

The sufficiency or insufficiency of accommodation for residence to a Hindu widow is a question of fact determinable by the exigencies of each case, and the High Court in second appeal will not disturb the conclusions arrived at by the Courts below. **Kisandas Rupchand v. Rangubai Nanchand**, 9 Bom.L.R. 382.

RUSSELL, AG. C.J., and BEAMAN, J.

(4) *Wife's right to reside in family house—Sale of house for family debt.*

A Hindu widow may be turned out of the family house, if the debts, on account of which alienation is being made, are *bona fide* family debts. The Mahomedan wife or widow is a creditor of her husband on account of her dower, which is a debt; and she is, perhaps, as regards his estate, a creditor preferred to all other creditors. But a Hindu wife or widow is no creditor on account of her maintenance or right of residence. If the estate had dwindled to nothing, as a consequence of family expenditure and family debts incurred by her husband in the ordinary way of business and living, there remains nothing for her, any more than for her husband or his heirs. **Nihal Devi v. Shib Dial**, 36 F.R. 1907.

JOHNSTONE and SHAH DIN, JJ.

Hindu Law.—(Continued).

—22.—(Widow).—(Continued).

References :—2 A. 315, 2 M. 126, 6 M. 130, 12 M. 260, 17 B. 398, 39 P.R. 1896, referred to.

- (5) *Widow holding the power of execution under a certificate of administration—Powers of the widow—Person building on the land of another in the belief that it belongs to him—Rights of the owner of the land—Acquiescence—Standing by.*

A Hindu widow, holding the power of execution under a certificate of administration granted to her by the District Court, has only the powers of a Hindu widow or manager of a joint Hindu family (a); and she cannot sell the property, unless there is justifiable or pressing necessity according to Hindu law.

If a stranger builds upon the land of another, although believing it to be his own, the owner is entitled to recover the land with the buildings on it, unless there are special circumstances, amounting to a standing by on the part of the real owner, such as to induce the belief that he intended to forego his right. **Vinayakrao Ganapatrao v. Yidyashankar Bharati**, 9 Bom. L.R. 404.

CHANDAYARKAR and PRATT, JJ.

References :—(a) 1 B. 269, 2 B. 388 (408), 22 B. 1, 26 B. 304, 21 C. 732, 20 B. 298, R.

- (6) *Decree obtained against, binding on reversioner—Ex parte decree, whether one fairly and properly obtained against widow.*

The general rule is that, in a suit brought by a third person against a Hindu widow to recover, or to charge, an estate of which she is the proprietress, she will, as defendant, represent and protect the estate, as well in respect of her own as of the reversionary interest. The mere fact that a decree obtained against a Hindu widow is an *ex parte* decree will not be sufficient to show that there was fraud and collusion between the widow and the person who obtained the decree. It may be that the widow honestly believed that there was not a good defence to the suit, and, therefore, refrained from incurring the expense of a defence. In such a case, the decree obtained against the widow will bind the reversioner. **Lakshminarayana Sastry v. Yenkeyya and Yenkeyya v. Subbarayadu**, 17 M.L.J. 160.

BENSON and BODDAN, JJ.

References :—9 M.I.A. 604 and 11 M.I.A. 241 (267), R.

Hindu Law.—(Continued).

—22.—(Widow).—(Continued).

- (7) *Right to husband's separate property—Decree—Condition for security-bond.*

Plaintiff was the widow of Chajju Mal who was a member of a joint family but kept his self-acquired property separate. On his death, the widow brought a suit for a declaration that she was entitled to certain money kept in deposit by her husband. The judge gave her a decree on condition of her filing a security-bond that she would not spend the money otherwise than for her maintenance. *Held*, that the Court below had no right to annex any such condition to its decree. **Muli v. Maning Ram**, 4 A.L.J. 186 = A.W.N. (1907), 75.

KNOX and RICHARDS, JJ.

- (8) *Alienation of immoveable property by a widow for maintenance and pilgrimage—Necessity—Pilgrimage to take ashes to Ganges.*

A Hindu (Khatri) widow executed a mortgage deed of her husband's house for Rs. 300 in favour of her brother, S. Rs. 100 were, in respect of small items, from time to time, advanced to her by S. for her maintenance and the sum of Rs. 200 was paid to enable her to take a pilgrimage.

Held, that a widow cannot alienate her husband's immoveable property to take a pilgrimage, unless it is indispensable for the spiritual benefit of her deceased husband, for instance, a pilgrimage to take ashes to the Ganges, and that *quo* item of Rs. 200, the mortgage is not binding upon the reversioners. **Nanak Singh v. Sant Singh**, 19 P.W.R. 1907.

RATTIGAN, J.

Reference :—8 M. 552, P.

- (9) *Effect of relinquishment of estate by widow in favour of the present reversioners.*

A Hindu widow in possession of a widow's estate in property of her deceased husband, a separated and childless Hindu, relinquished possession thereof to two persons who at the time were the next reversioners, they agreeing to pay her a maintenance allowance; but it did not appear that she intended to make them, if she could, full owners of the property, although certain incorrect recitals in the agreement entered into by the widow, when she gave possession of the property, might have lent colour to this suggestion. Both the persons thus put into possession predeceased the widow. *Held*

Hindu Law.—(Continued).**—22.—(Widow).—(Continued).**

that the nearest reversionary heir to the widow's late husband was entitled to succeed on the death of the widow.

Quære. Whether, in these Provinces, a Hindu widow can accelerate the estate of the heir by conveying absolutely and destroying her life-estate? **Raj Kishore v. Dura Chhryan Lal**, A.W.N. (1906), 272=3 A.L.J. 755=29 A. 71.

STANLEY, C.J., and KNOX, J.

References:—19 C. 236, 6 A. 116, R.

(10) *Alienation by widow—Gift to reversioner for the time being if passes absolute title.*

If a Hindu widow transfers her interest to the then reversioner, the latter can hold the property against the person who is the reversioner when the widow dies (a.) **Annada Kumar Roy v. Indra Bhusan Mukopadhyaya**, 12 C.W.N. 49.

MACLEAN, C. J., and HOLMWOOD, J.

References:—22 W.R. 393 and 10 C. 1102, F.

(11) *Widow getting absolute estate under a compromise in a partition suit—Regulation XXV of 1802.*

It is open to parties effecting a partition to agree, as among themselves, as one of the terms of a compromise, that a widow of a deceased member of the family should take the property assigned to her as full owner, and not for life only; and though an agreement in these terms might not be binding, and might even be a fraud on members of the family not parties to the compromise, it would stand good as between the parties. It must, however, appear clearly from the instrument, by which effect is given to the compromise, that it was the intention of the parties to enlarge the estate which the widow would ordinarily take. This is, of course, a question of construction of the document, but the document must be construed with reference to the situation of the parties and their rights at the time the deed was executed (a).

Two persons sued another for partition of certain property alleged by them to belong to a joint family of which they and he were members, but which according to him formed part of his and his adoptive father's share of that property after division. One of the plaintiffs died pending the suit, and his widow was brought on the record as his representative.

Hindu Law.—(Continued).**—22.—(Widow).—(Continued).**

The matter in controversy was settled out of Court by a compromise, under which the defendant gave to the widow and the surviving plaintiff certain land in equal shares, in consideration of their withdrawing the suit, with powers of gift, sale, etc.

Held per MILLER, J.—that, under the circumstances, the widow took an absolute estate in the property given her.

Per WALLIS, J. (contra)—The widow took only an estate for her life. Held also that the words "you shall enjoy the said lands with the rights of gift, sale, etc." are words of common form borrowed from Reg. XXV of 1802, and were probably inserted, rather for the purpose of making it clear that the transferor had ceased to have any interest in the property transferred, than for the purpose of describing the interests, which the widow and the other donee were intended respectively to take (b). **Sambasiva Aiyar v. Viswam Aiyar**, 17 M.L.J. 243=2 M.L.T. 316=30 M. 356.

MILLER and WALLIS, JJ.

References:—(a) 6 M.I.A. 1, 8 C.L.R. 57, 11 A. 296, R; (b) 8 C.L.R. 57, E.

(12) *Decree against a Hindu widow—when binding on reversioners.*

When a decree is passed against a Hindu widow on a compromise, under which a small portion of the property is given to the widow's mother-in-law for maintenance, it not being shown that this was anything but a reasonable arrangement, the reversioners are bound by that decree. **Anandi v. Mahadel**, 4 A.L.J. 490=A.W.N. (1907), 199.

AIKMAN, J.

(13) *Decree against widow, effect of, on reversioners—Adverse claim set up by a Hindu widow—Representation of the estate—Daughter's sons, succession amongst per capita not per stirpes.*

Held that, where a Hindu widow puts forward a claim in her own right adversely to the reversioners, she cannot be considered to represent the estate; a decree for sale obtained against the widow under such circumstances cannot be considered binding on the reversioners, and a sale, if held in execution of such a decree, should be considered to pass only the interest of the widow and not that of the reversioners.

Hindu Law.—(Continued).**-22.—(Widow).**—(Continued).

Held further that, after the death of the daughters who succeeded to a Hindu woman's estate, the daughters' sons take *per capita* and not *per stirpes*. **Birj Bhukhan v. Sheoraj Narain**, 10 O.C. 159.

CHAMBERLAIN and EVANS, A.J.CS.

References:—9 M.L.A. 539, 21 C. 8, D; 25 A. 469, R.

- (14) *Widow—Mortgage by Hindu widow—No legal necessity—Mortgagee spending money for repairs on the mortgaged property—Reversioners suing to recover the property not bound to pay the money—Mortgagee cannot be allowed to remove the house built by him on the property.*

The money spent by a mortgagee, in repairs of the property, which is mortgaged to him by a Hindu widow, without any legal necessity justified by Hindu Law, cannot be recovered by him, from the reversioner, who sues on the widow's death to recover the possession of the property.

If the mortgagee has erected a building on the property, he cannot claim a right to remove the building, before he is made to hand over the possession of the property to the reversioner. (a) **Yijbhukandas Dwarkadas v. Dayaram Jadav**, 9 Bom. L.R. 1181.

CHANDAVARKAR and HEATON JJ.

References:—(a) 9 Bom. L.R. 404, 20 B. 298, 6 B.H. C.A.C. 80, D.

- (15) *Widow, power of—Decree for mesne profits silent as to interest—Security bond agreeing to pay interest—Stay of execution proceedings—Limitation—Civ. Pro. Code, Ss. 211, 212, 236, 244, 546—Reversioner, if bound by act and covenant of widow in possession—Interest, high rate of, whether justifiable.*

As a Hindu widow, although she takes in some respect only a qualified interest in her husband's estate, fully represents that estate, the succeeding heirs are bound by a decree properly and fairly obtained against her. (a)

Although, under the Hindu Law, a widow is allowed to bind the estate of her deceased husband as against the reversionary heirs, for the purpose of raising necessary funds, it must be established that the purpose for which the liability had been imposed was really necessary for the protection of the estate (b).

Hindu Law.—(Continued).**—22.—(Widow).**—(Continued).

When a Hindu widow, to prevent the sale of her husband's property, during the pendency of an appeal, in which there was no substance, and to obtain stay of the execution proceedings, gives a security bond and agrees to pay interest at the rate of 12 per cent. per annum upon the amount of mesne profits decreed, although the decree for mesne profits did not carry interest, and creates a charge in respect of the same upon a portion of the estate of her son, her act is, in essence, an unauthorised and unjustifiable alienation of a portion of that estate, and is neither necessary nor beneficial to the estate, and it is open to the reversionary heir to question the propriety of her act, and her covenant does not bind the reversionary heir.

Although a loan by a Hindu widow may be necessary, the rate of interest at which she borrows must be proved to be necessary before interest at that rate will be allowed; and even assuming that the widow was, in the present case, justified in giving a security bond to obtain a stay of execution proceedings under S. 546 of the Civ. Pro. Code, the necessity to enter into an agreement to pay interest at a high rate will have to be established before it can be made to bind the reversioner (c). **Harmanoje Narain Singh v. Ramprosad Narain Singh**, 6 C.L.J. 462.

MOOKERJEE and HOLMWOOD, JJ.

References:—(a) 9 M. I.A. 539; 21 C. 8, R. (b) 12 W.R. 187 R; 7 C.W.N. 678; 8 C.W.N. 843, D; (c) 18 C. 311, R.

- (16) *Mitakshara—Widow inheriting movables from her husband—Limited rights—She cannot make a gift of the property.*

Under the Mitakshara, a Hindu widow inheriting moveable property from her husband who dies childless and intestate, does not take an absolute interest in the property. She is, therefore, not competent to make a gift of the property. **Pandharinath Vishvanath v. Govind Shivram**, 9 Bom. L.R. 1305.

RUSSELL, A.C.J., and HEATON, J.

- (17) *Widow's estate—Alienation of husband's estate without legal necessity—Consent of reversioners—Consent ex post facto—Bhale Sultan Chattri tribe of Oudh—Custom excluding daughter and her issues from inheritance—Proof—General custom—Evidence Act (I of 1872), S. 48.*

Hindu Law.—(Continued).**—22.—(Widow).—(Continued).**

In the absence of legal necessity, a Hindu widow can alienate property, to which she has succeeded on the death of her husband, with the consent of the nearest reversioners for the time being. Ordinarily, the consent of the whole body constituting the next reversioners should be obtained, though there may be cases, in which special circumstances may render the strict enforcement of this rule impossible.

The consent of the reversioners is effective even when given after the execution of the deed of transfer (a).

Held that the evidence, adduced in this case, proved the existence amongst the Bhalu Sultan Chattris in Oudh, of a general custom, excluding daughters and their issue from inheritance. **Bajrangli Singh v. Manokarnika Baksh Singh**, 12 C.W.N. 74 (P.C.)=9 Bom. L.R. 1348=6 C.L.J. 766.

LORD MACNAGHTEN, SIR ANDREW SCOBLE
and SIR ARTHUR WILSON.

References:—(a) 17 C. 896, *Appr*; 6 A. 116, *disappr*; 10 C. 1102, 21 M. 128 and 25 B. 129, *R*.

(18) *Mortgage—Hindu widow acting adversely to adopted son—collusion with mortgagee—Benefit to estate—charge upon estate—Lis pendens—Transfer of Property Act (IV 1882), S. 52—Cir. Pro. Code (XIV of 1882), S. 410—Application to sue in forma pauperis subsequently admitted—contentious suit or proceeding.*

Where a Hindu widow adopted an adverse attitude against her husband's adopted son, and executed a mortgage in collusion with the mortgagee, not as guardian of such son but in her own right, *held* that the mortgage could not be enforced against the son to the extent of a debt, which was not a charge on the estate, merely on the ground that the estate was benefited by the payment of such debt (a).

Where, after an application for leave to sue in forma pauperis had been made, but before it was granted, the defendant mortgaged part of the property in dispute, and the plaintiff's suit was subsequently, after contest, decreed, *held* that S. 53, Transfer of Property Act, applied, and the mortgage could not be enforced against the plaintiff. **Ambika Partap Singh v Dw arka Parshad**, 4 A.L.J. 795.

STANLEY, C.J. and BURKITT, J.

Hindu Law.—(Continued).**—22.—(Widow).—(Concluded).**

References:—(a) 6 M. I. A. 393 D. (b) 29 A. 349, *R*.

(18-a) The alienation by one of two co-widows is not *ipso facto* invalid—See HINDU LAW (REVERSIONERS), No. 4. 30 M. 3.

(19) Alienation by—Suit by reversioner to recover property—Limitation—See LIMITATION ACT, No. 75, 8 Bom. L.R. 675=31 B. 1.

(20) Gift by widow of portion of property inherited from husband—Subsequent adoption—Suit by adopted son—See LIMITATION ACT, No. 109, 4 A.L.J. 354.

(21) Remarriage—forfeiture of interest in the estate of first husband—Transferees from a person not entitled to transfer; right of—See ACT XV OF 1856 (WIDOW REMARRIAGE), No. 1, 3 A.L.J. 729.

(22) Lease by widow—Suit by reversioner to recover possession after widow's death—Reversioner not bound to set aside alienation—See LIMITATION ACT, No. 77, 11 C.W.N. 424.

(23) Power of—to alienate beyond her own life time a service inam enfranchised in her name—See ACT IV OF 1866 (MADRAS), No. 1, 17 M.L.J. 101.

(24) Widow carrying on business of husband—Death of widow—Liability of reversioners for trade debts incurred by widow—See HINDU LAW (DEBTS), No. 6, A.W.N. (1907), 155.

(25) Suit to recover property alienated by widow—See LIMITATION ACT, No. 78, 10 O.C. 163.

—23.—(Will).

(1) *Construction of—Direction as to accumulation—validity of—*

It is not incompetent for a Hindu testator to direct accumulations.

Principles governing the validity of directions for accumulation examined and explained.

Rajendra Lall Agarwalla v. Raj Coomari Dabi, 11 C.W.N. 65=34 C. 5.

HARRINGTON, J.

References:—1 C.W.N. 345=24 C. 589; on app. 2 C.W.N. 389=25 C. 662 and 4 C. 443, *R*.

(2) *Interpretation—Bequest in favour of Hindu female—"Malik."*

The word *malik* ordinarily denotes the absolute owner of property, and its ordinary meaning is to be given to it, unless there is to be

Hindu Law.—(Continued).

—23.—(Will).—(Continued).

found in the will indications that it was not the intention of the testator to use it in its ordinary sense.

Where, therefore, all that was said in a will by a Hindu testator was that he had two heirs, a wife and a daughter, and they should be *maliks* of his property in specified shares, *held*, that the devisees acquired an absolute interest in the property, and the widow could mortgage it at her pleasure (a). **Padam Lal v. Tek Singh**, 4 A.L.J. 68 = A.W.N. (1907), 19 = 29 A. 217.

STANLEY, C.J. and BURKITT, J.

References:—(a) 24 C. 406; 24 C. 834. (P.C.); 27 C. 44, 649, R. 27 A. 364, Dist. 25 A. 351, Diss.

- (3) Title acquired under will of deceased wife—Property devised subject to mortgages—Compromise of claims of reversioners to estate of wife's father—Nature of devisee's title not thereby faltered.

One M died leaving certain property, of which his widow J took possession. J died leaving the property by her will to her daughter A, who also died after making a will leaving the property in question to her husband R.

Both the wills provided that the devisee was to pay off certain incumbrances existing on the property. After the death of A, the property was claimed by the reversionary heirs to M's estate, but this claim was settled by a compromise, by which R gave certain land to the claimants, in consideration of their entirely withdrawing their claim to the rest of the property.

Held, that this compromise did not convey to R the title of the reversioners; but that he took under the will of his wife and could not, therefore, raise any defence to a suit for sale brought by the mortgagees, which J or A could not themselves have raised. **Ram Shankar Lal v. Ganesh Prasad**, A.W.N. (1907), 115 = 29 A. 451.

BANERJI and AIKMAN, JJ.

References:—1 I.A. 157, 25 A. 546, 28 A. 352, A.W.N. (1907), 97, R.

- (4) Will of a Hindu female, possession under—Person in possession estopped from denying her title—Compromise by reversioners—No transfer—Confirmation of title.

When a person takes under the will of a Hindu female, he takes it subject to the incum-

Hindu Law.—(Continued).

—23.—(Will).—(Continued).

brances created by the female and cannot plead that he is not bound to discharge them.

R obtained possession of the property under the will of his wife. The reversioners, in view of the trouble and uncertainty attending a suit for possession, took a portion of the land from R and executed a relinquishment in his favour.

Held that this did not constitute a transfer of reversionary rights but that it was a compromise, by which the reversioners admitted the title, under which R was in possession (a). **Ram Shankar Lal v. Ganesh Prasad** 4 A.L.J. 273 (F.B.) = A.W.N. (1907), 97 = 29 A. 385 = 2 M.L.T. 248.

STANLEY, C.J., KNOX, BANERJI, BURKITT, AIKMAN and RICHARDS, JJ.

References:—(a) 1 I.A. 157; 25 A. 546; 28 A. 352, F.

- (5) Revocation of a will by the birth of posthumous son—S. 57, Succession Act—S. 3, Hindu Wills Act—Scope.

A will of self-acquired property made by a Hindu is not revoked by the birth of a posthumous son of the testator.

The Hindu Wills Act not only does not provide for revocation on the ground of any alteration in circumstances, but by incorporating S. 57 of the Succession Act, it makes express provision for the way in which a will shall be revoked. The language of the section is, not that a will may be revoked in certain ways, but that no will shall be revoked except in certain ways. The section is exhaustive.

Reading Ss. 56 and 57 of the Succession Act together, there is no doubt that, under that Act, the law as to the revocation of wills is the same as the law under the English Wills Act:—*Per Chief Justice*. **Subba Reddi v. Doraisami Bathan and Papammal**, 17 M.L.J. 269.

WHITE, C.J., BENSON and MILLER, JJ.

References:—8 C. 637, 12 M. 401, R.

- (6) Devise of self-acquired property to sons—Nature of sons' interest—See HINDU LAW (JOINT FAMILY), No. 11, A.W.N. (1907), 77.

(7) Hindu will speaks from the date of death—Presumption as to destruction of wills in India and in English Law—See WILL, No. 3, 8 A.L.J. 747.

(8) Bequest to family idol—Residue could be diverted to other useful purposes—*Cy pres* doctrine—See IDOLS, No. 1, 9 Bom. L.R. 370.

Hindu Law.—(Concluded).

—23.—(Will).—(Concluded).

(9) Testamentary disposition by a member of a joint Hindu family—Partition after bequest, but before the death of the testator—Validity of the bequest—See HINDU LAW (ALIENATION, No. 6, 150 P.R. 1907.

Hindu Wills Act.

See ACT XXI OF 1870.

Holding.

(1) Question of transferability of, when may arise—See ACT VIII OF 1865 (BENGAL RENT RECOVERY), No. 1, 6 C.L.J. 43.

Holding over.

(1) Meaning of,—Presumption as to—See LADLORD AND TENANT, No. 12, 34 C. 396.

Husband and Wife.

(1) *Petition by husband for dissolution of marriage—Claim for damages against co-respondent—Death of respondent, effect of—Abatement.*

Where in a proceeding for dissolution of marriage in which the husband was petitioner and damages were claimed against the co-respondent, the pleader for the respondent informed the Court that his client had died; *held* that the petition was liable to be thrown out on the ground that it abated by the death of the respondent.

Also since damages could not be decreed in such a case unless upon dissolution of the marriage by order of the Court; the abatement of the petition entailed abatement of the claim against the co-respondent for damages. **S. v. S. & B.**, 60 P.R. 1906=69 P.L. R. 1907.

READ, J.

(2) Attachment of property in wife's name—Benami—Onus of proof—See BENAMI TRANSACTIONS, No. 1, 17 M.L.J. 339.

Idol.

(1) *Bequest to family idol—Residue could be diverted to other useful purposes—Cy pres doctrine.*

Where a testator had dedicated under his will a portion of his estate to the worship of his family idol, and a residue was left after the performance of all the expenses in this respect, *held*, that the Court could divert a portion of the residue of the estate to other useful charitable purposes. **Nanu Narayan Kothare v. The Advocate-General of Bombay**, 9 Bom. L.R. 370.

DAYAR, J.

Idol.—(Concluded).

(2)—which has been broken whether capable of holding property—See RELIGIOUS ENDOWMENTS, No. 6, 12 C.W.N. 98.

Illegitimate son.

(1) Suit by, against natural father for maintenance—Decree creating charge on joint family property—Legitimate sons not parties to above suit—Their liability after father's death—See HINDU LAW (MAINTENANCE), No. 1, 2 M.L.T. 83.

Impartible estates.

(1) Debts due to—Necessity of succession certificate—Nature of succession to—See ACT VII OF 1889 (SUCCESSION CERTIFICATE), No. 1, 17 M.L.J. 367.

Imprisonment.

(1) Nature of, under S. 359, Civ. Pro. Code—Subsequent change of, from simple into rigorous—See CIV. PRO. CODE, No. 202, 5 C.L.J. 445.

Improvements.

(1) Charge for second crop on punja (dry) land—Absence of proof of custom—Enhancement of rent on account of tenant's improvements—See ACT VIII OF 1865 (RENT RECOVERY, MADRAS No. 7, 17 M.L.J. 513.

(2) Claim to increased rent on improvements by tenants—See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), No. 10, 17 M.L.J. 511.

Income Tax.

(1) Levy of, on net profits derived from mines—See ACT IX OF 1880 (ROAD CESS BENGAL), No. 3, 5 C.L.J. 148.

(2) Liability to pay, does not necessarily carry exemption from Road and Public Works Cesses—See ACT IX OF 1880 (CESS, BENGAL) No. 2, 11 C.W.N. 1053. (F.B.).

Income tax Act.

See ACT II OF 1886.

Indigo factory.

(1)—Occupancy holding—Indigo factory, erection of, if renders land unfit for agricultural purposes—Question of fact—Interference in second appeal—Civ. Pro. Code, (Act XIV of 1882) Ss. 584 (a), 585.

The question whether the erection of an indigo factory, within the limits of land let out for agricultural purposes generally will render the land unfit for the purposes of the tenancy is essentially a question of fact.

Indigo factory.—(Concluded).

It cannot be laid down broadly as a proposition of law—and without reference to the circumstances of individual cases, without regard to the size of the holding, or of the area withdrawn from actual cultivation, or to the effect of such withdrawal upon the fitness of the holding, taken as a whole, for profitable cultivation—that the erection of an indigo factory on a part of land let out for agricultural purposes generally must render it unfit for the purpose of the tenancy (*a*). **Hari Mohun Misser v. Surendra Narayan Singh**, 11 C.W.N. 794 (P.C.) = 6 C.L.J. 19 = 9 Bom. L.R. 750 = 17 M. L.J. 361 = 2 M.L.T. 399.

LORD ROBERTSON, LORD COLLINS and SIR ARTHUR WILSON.

References :—(*a*) 9 C.W.N. 87 = 31 C. 174, reversed.

Indorsee.

(1) Rights of, of pro-note with notice of unlawfulness of consideration—See **CONTRACT ACT**, No. 15, 17 M.L.J. 252.

Inheritance.

(1) —among *Romo-Syrians*—*Child inheriting mother's stridhanam*—*Father entitled to succeed to such property in preference to maternal grandfather*.

Where property has once vested in a person as last male holder, he becomes a stock of descent, and proximity in blood will afterwards necessarily govern the succession. If the property inherited from the mother was stridhanam property in the first instance, when once it vests in the child on her decease, it no longer preserves its origin as stridhanam property, and descends on a footing with any other property of the child. So among the Roman Syrian Christians, where a child inherits stridhanam property from his mother, it was held that the father is entitled to succeed to such property in preference to the maternal grandfather. **Ousep Mathai v. Osep Kora**, 22 T.L.R. 205.

GOVINDA PILLAI, HUNT, and RAMACHANDR ROW, JJ.

(2) **Shanars**—Right of Christian convert to inherit—See **CONVERSION**, No. 1, 22 T.L.R. 246.

Injunction.

(1) *High Court's power to grant temporary injunction independently of Civ. Pro. Code*.

Where certain persons bring a suit in the High Court for money due on a balance of ac-

Injunction.—(Continued).

count, and the defendants in that suit had previously instituted a suit against the former, in the Bareilly Court, to recover from the former a certain amount as balance due to themselves on the same account, the High Court can, on the application of the former, grant an injunction to restrain the latter from proceeding with the suit in the Bareilly Court. The powers of the High Court to grant temporary injunction are not confined to the terms of Ss. 492 and 493 of the Civ. Pro. Code. Its powers of control over persons within its jurisdiction by injunctions operating *in personam*, are not restricted by the provisions of the Code. **Mungle Chand v. Gopal Ram**, 34 C. 101.

SALE, J.

(2) *High Court's power to grant temporary injunction independently of Civ. Pro. Code*.

Where plaintiff brings a suit in the High Court, for the specific performance of an agreement for lease of certain premises, and the defendant in that suit brings a suit against the former in the Small Cause Court to eject the former from the same premises, the High Court can, on the application of the plaintiff (former), grant an injunction restraining the defendant from proceeding with the suit in the Small Cause Court, pending the hearing of the suit in the High Court. The High Court has, independently of the Civ. Pro. Code, power to grant the injunction sought, and that power is not affected by the fact that Ss. 492 and 493 of the Code do not mention the particular injunction sought by the plaintiff. **Rash Behary Dey v. Bhawani Churn Bhowe**, 34 C. 97.

WOODROFFE, J.

References :—27 B. 357, *Diss.*; 33 C. 927, 9 C.W.N. 748, 34 C. 101, *It*.

(3) Considerations for grant of temporary injunction—See **CIV. PRO. CODE**, No. 33, 53 P.L.R. 1907.

(4) Value of relief by way of injunction—Prayer for injunction—Consequential relief—See **COURT FEES ACT**, No. 4, 11 C.W.N. 705.

(5)—where a member of a caste is not allowed to inspect documents, etc., relating to caste property—See **CASTE**, No. 1, 9 Bom. L.R. 569.

(6) Exclusive right to act as **Khatib**—Suit for injunction to restrain others from acting

Injunction.—(Concluded).

as such, whether maintainable—See **RIGHT OF SUIT**, No. 5, 17 M.L.J. 421.

Insolvency.

- (1) *Insolvency order passed by Chartered High Courts, effect of—Decree-holder, right of, where debt wrongly entered in the schedule—Order of discharge passed by Chartered High Courts operate throughout the whole of British India.*

Held that, where a judgment-debtor had been declared insolvent by the High Court at Calcutta, but the amount due to a particular decree-holder had been entered wrongly in the schedule of debts filed by the judgment-debtor, the decree-holder was not entitled to proceed in execution against the judgment-debtor for the amount of the decretal money not entered in the schedule. The order of the High Court should be considered as giving the judgment-debtor a personal discharge as to the claim, whatever its amount might be, the remedy of the decree-holder in such a case being, if any, to move the High Court to re-consider its decision.

Held, further, that orders relating to insolvency passed by the Chartered High Courts under the Insolvent Debtors' Act do not extend only to Presidency towns but operate throughout British India (a). **Bithal Das v. Munshi Itisham Ali**, 10 O. C. 305.

CHAMIER and GREEVEN, JJ.

References:—(a) 2 Hyde, 1; 7 B. H. C. 22; 6 Bom. L.R. 81 and 6 A. 84, R.

- (2) *Composition with creditors—Unscheduled debt—Reservation of debt in plaintiff's favour unknown to other creditors—Suit on unscheduled debt—Maintainability.*

The principle is clear, that, upon a composition deed, all the parties are supposed to stand in the same situation, and if there is any one of them who refuses to do so, he must announce it at the time of composition.

Such a transaction, as a composition deed, is necessarily *uberrimae fidei*, and no engagement can stand, which has been withheld from the knowledge of the whole body of creditors, and which would have been material for them to know.

Thus, a person who was adjudged an insolvent entered into a composition deed with certain of his creditors, of whom the plaintiff was one, on condition, that, on certain terms

Insolvency.—(Concluded).

being fulfilled, the deed ought to operate as an effectual order of final discharge, under the Indian Insolvency Act, in respect of the debts due to such creditors.

The plaintiff, one of such assenting creditors, subsequently brought a suit on two items of debts, which were not included in the schedule attached to the composition deed. It also appeared that this reservation in favour of the plaintiff was not made known to the other creditors. *Held* that such suit is not maintainable. **M. N. N. Raman Chetty v. Abdul Kader**, 4 L. B. R. 101.

FOX, C.J.

References:—(1829) 5 Bingham 460, F; (1815) 5 Maule and Selwyn 423, R.

- (3) *Purchaser of immovable property in insolvency proceedings—Delay in payment of purchase-money—Liability to pay interest—Transfer of property Act, Ss. 55 (4) b, and 57 (a).*

Where, in an insolvency proceeding, a person purchases immovable property and is put in possession, he is liable to pay interest for the period during which the purchase-money remains unpaid. The fact that a purchaser's title has vested is no excuse for delay in payment of the purchase-money (a).

Although the Transfer of Property Act does not apply to the Punjab, Ss. 55 (4) (b) and 57 (a) may be applied to suits in the Punjab Courts, as they are equitable. **Saran v. Bashishar Nath**, 148 P. R. 1907.

CLARK, C.J., and REID, J.

References:—9 A. 180; 92 P. R. 1893; 104 P. R. 1901; 23 W. R. 325; 1 M. H. C. 369, R; 21 C. 566, F; 92 P. R. 1893, Distd.

Insolvency Act (Ss. 11 and 12 Vic. c. 40).

- (1) *S. 7—Insolvent—Vesting order—Official Assignee—Withdrawal of the petition for insolvency—Property re-vested in the withdrawing insolvent.*

On the filing of a petition in insolvency, a vesting order is made in favour of the Official Assignee and the property of the insolvent vests in him. The adjudication of a man insolvent has the same effect. On the withdrawal of the petition for insolvency, the vesting order comes to a determination and must be taken to be annulled: and the property of the insolvent reverts in him. **Macleod v. Haji Sajjan Lalji**, 9 Bom. L.R. 1006.

DAVAR, J.

Insolvency Act (Ss. 11 & 12 Vic. c. 40.)—
(Concluded).

(2) S. 7—Benefit of executory contract, if can vest in official assignee—See TRANSFER OF PROPERTY ACT, No. 1, 11 C.W.N. 566.

(3) Ss. 18 and 49, Scope of—See CIV. PRO. CODE, No. 143, 9 Bom. L.R. 898.

(4) S. 49—See No. 8, *supra*.

Insolvent.

(1) Right to obtain possession of after-acquired property.

Where a person becomes an insolvent, prior to the death of a qualified female proprietor, the interest, which devolves on him, on her death, as one of the *bandhus* of her son, is his after-acquired property, to which he has a right against all the world, except the official assignee, and, where the official assignee has not intervened, the insolvent can sue to obtain possession of such property (a).

Until the trustee intervenes, all transactions, by a bankrupt after his bankruptcy, with any person dealing with him *bona fide* and for value, in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee (b). **Sriramulu Naidu v. Andalammal**, 17 M.L.J. 14=80 M. 145.

WHITE, C. J., and SUBRAHMANIA IYER, J.

References :—(a) 5 Q. B. R. 965, *It*; (b) 25 Q. B. D. 262, 17 M. 21, *R*.

(2) Order refusing benefit of Insolvency Act—Appeal—Court's powers to grant interim order for insolvent's protection from arrest pending appeal—Lower Burma Courts Act, S. 8—Civ. Pro. Code, Ss. 4, 545, 639 and 647.

S. 8 (3), Lower Burma Courts Act, says that nothing in Ch. XX, Civ. Pro. Code, shall apply to any Court having jurisdiction within the Rangoon town. Sub-sec. 2 of the same section says that the procedure in insolvency cases shall be, as far as practicable, in accordance with the procedure prescribed by the Indian Insolvency Act, 1849. The only power given by that Act, to grant an *interim* order, for the protection of the insolvent from arrest, is that given by S. 13 of the Act to the Court, to which the insolvent has presented his petition. S. 73 of that Act, which deals with the powers of an appellate Court, does not give power to such Court to grant an *interim* order for the insolvent's protection from arrest, pending the hearing of the appeal against the order of the lower Court

Insolvent.—(Concluded).

dismissing the petition for insolvency. *In the matter of Jacob Agabob*, 3 L.B.R. 241.

Fox, C.J., and IRWIN, J.

(3) Security for filing application by judgment-debtor to be declared insolvent—See CIV. PRO. CODE, No. 198, A.W. N. (1907), 120.

(4) Debt not scheduled—Creditor's right to execute his decree against property of—See CIV. PRO. CODE, No. 201, 9 Bom. L.R. 466.

(5) Omission to frame schedule—Creditor not barred from suing for debt—See CIV. PRO. CODE, No. 199, 64 P.R. 07.

(6) Application by judgment-debtor to be declared as—application to transfer by decree-holder—Jurisdiction of Court—See CIV. PRO. CODE, No. 32, 10 O.C. 139.

Instalments.

(1) Payment by, of amount of rent decree—See ACT VIII OF 1885 (BENGAL TENANCY), No. 1, 11 C.W.N. 857.

(2) Default in payment of—Waiver—Limitation—See LIMITATION ACT, No. 73, 11 C.W.N. 903.

(3) Money payable by,—Default in payment of two instalments—"One instalment," meaning of—See LIMITATION ACT, No. 71, 10 O.C. 6.

Insurance Policy.

(1) Open and valued policies—Difference—Suit to recover value of goods lost—Fraud and misrepresentation—Burden of proof—Contract Act, S. 17.

The plaintiff insured his goods through the defendant's vessel. They were lost on the way, as they had to be jettisoned on account of an accident which happened to the boat which carried the goods to the vessel in which they had to be shipped.

In a suit to recover the value of such goods, the defendant alleged that the plaintiff was guilty of fraud and misrepresentation in obtaining the policies, that the goods were wilfully thrown into the sea, that the bags did not contain the goods which the plaintiffs declared that they contained, but they were filled up with articles of much inferior value, and that the boats were undermanned etc.

It was held on the evidence :—(1) That the defendants had not discharged the burden of proving the fraud and misrepresentation which they alleged; (2) That it was not

Insurance Policy.—(Concluded).

proved that the valuation was so grossly exaggerated as to lead to the inference of fraud; (3) that there was no satisfactory evidence to show that the bags could have been saved or that the boat was undermanned, and that therefore the defendants were liable to pay the plaintiffs the damages claimed.

Held, further, that in a suit to recover the value of goods insured a mere exaggeration of the value of the property is not sufficient to avoid the policy; but, that, if the valuation was gross and excessive, fraud might be presumed.

A policy may be either open or valued. In the former case, the value of the subject-matter of the insurance is not stated in the policy and must be proved after a loss. In the latter, to prevent the necessity of proving the actual value in the event of a loss, a value agreed upon by the parties is mentioned in the policy and is conclusive between them in case of loss. **G. H. Davey v. Haji Kassim Ibrahim**, 22 T.L.R. 99.

GOVINDA PILLAI, PADMANABHA IYER and
RAMACHANDRA RAO, JJ.

Interest.

(1) Although a tender does not extinguish the indebtedness, a valid tender, which is kept good, stops the running of interest after the tender. This principle applies to tenders by tenants to landlords. **Jagat Tarini Dasi v. Nabagopal Chaki**, 5 C.L.J. 270 = 34 C. 305.

MOOKERJEE and HOLMWOOD, JJ.

References:—2 P. Wms. 378, 13 Peters (U.S.) 136 and 6 Otto (U.S.) 580, *R.*, 7. C.W.N. 720, *explained and distinguished* and 29 C. 854 (862, 870), *R.*

(2) Rate of—Mode of calculation—See MORTGAGE (GENERAL), No. 16, 11 C.W.N. 403.

(3) Whether the word 'Rent' in the Bengal Tenancy Act includes—See ACT VIII OF 1885 (BENGAL TENANCY), No. 17, 11 C.W.N. 110 = 5 C.L.J. 69.

(4) Mortgage of minor's property by natural and *de facto* guardian—Liability of minor—Liability to pay interest—Rate of interest—See MORTGAGE (GENERAL), No. 11, 5 C.L.J. 542.

(5) Court's power to award—See ACT XVII OF 1879 (DEKHAN AGRICULTURISTS' RELIEF BOMBAY), No. 3, 9 Bom. L.R. 550.

Interest.—(Concluded).

(6) If, can be claimed in execution proceedings, when decree is silent as to—See MESNE PROFITS, No. 2, 6 C.L.J. 462.

(7) Implied authority to agree to payment of—See AGENT, No. 1, 6 C.L.J. 639.

(8) Provision for payment of, in the shape of *Deorha*—See CIV. PRO. CODE, No. 275, 10 O.C. 214.

(9) Vendor and purchaser—Delay in payment of purchase-money—Liability to pay interest—See INSOLVENCY, No. 3, 148 P.R. 1907.

Interest Act.

SEE ACT XXIII OF 1839.

Interpleader suit.

Adjudication on claims of defendants in an, is a decree and appealable under S.540, C.P.C.—See CIV. PRO. CODE, No. 7, 4 A.L.J. 683.

Interpleading.

Discretion as to, in an order and appealable under S. 588, C.P.C.—See CIV. PRO. CODE, No. 7, 4 A.L.J. 683.

Inventions and Designs Act.

SEE ACT V OF 1888.

Irregularity.

(1) Appeal heard before the hour fixed for hearing cases—Court refusing to hear pleader on his appearance—See APPEAL (GENERAL), No. 7, 14 P.W. R. 1907.

Irrigation Cess Act.

SEE ACT VII OF 1865 (MADRAS).

Jains.

(1) *Adoption—Custom—Authority of widow to adopt—Adoption of married man.*

Held that, according to the law and custom prevailing amongst the Jain community, (1) a widow has power to adopt a son to her deceased husband, without special authority to that effect, and (2) a married man may lawfully be adopted. **Manohar Lal v. Banarsi Das**, A. W.N. (1907), 121 = 4 A.L.J. 407 = 29 A. 495.

• STANLEY, C.J., and BURKITT, J.

References:—S.D.A. Reports. Vol. 5, p. 276, 1 A. 688, 8 A. 319, 17 A. 294, 21 A. 419, 8 Bom. H.C.R.A. C.J. 67, 12 Bom. H.C.R. 364. 10 B. 80, 4 Bom. H.C.R.A. C.J. 191, and 11 Bom. H.C.R. 193, *R.*

Jajmani Bahis.

Sale of books—Jajmani Bahis—Right to act as hereditary guide, transfer of—See TRANSFER OF PROPERTY ACT, No. 7, 4 A.L.J. 712.

Jenmi and Kudiyam Regulation (Travancore).

- (1) *Jenmi Bhogam, suit for—Applicability of the Regulation—Limitation Regulation, 108.*

In a suit for Jenmi Bhogam, where it was found, that the property was held on pandarapattom, and not on kanapattom tenure, and that the plaintiff was entitled to the Jenmi Bhogam under the Sirkar who had assigned a part of the revenue to the plaintiff, it was held that the Jenmi and Kudiyam Regulation did not apply to the case.

Held, also, that claims for Jenmi Bhogam, being claims in the nature of recurring rights, is governed by Art. 108 of the Limitation Regulation. **Madhavaru Govindaru Nampuri v. Narayanan Narayanan**, 22 T.L.R. 176.

SADASIVA IYER, C.J., and RAMACHANDRA ROW, J.

- (2) *Ss. 3, cls. (11 & 12), 26—Aravakasam—Alakada—Oppusuchi—Olanpanam—Onakalcha—Right to—Rights of non-brahmin transferee of jenmion property.*

The Aravakasam fees are presents payable on occasions of the six important ceremonies occurring in a Malayali Brahmin Jenmi's family. The fees are payable only if and when the ceremonies take place. They are therefore not awardable to Christian transferees of the land (a). *Per Padmanabha Iyer, J.*

Fees payable to the ancient Brahmin overlords forming the landed spiritual aristocracy should not be continued when the lands pass to others. The Aravakasams were payable as a contribution towards the important Hindu religious domestic ceremonies in the Brahmin Jenmi's family. Therefore the attempt of plaintiff (a Romo-Syrian Christian landlord) to alter the occasions on which Aravakasams were paid to the Brahmin Jenmi, into the occasions when analogous Christian religious ceremonies take place in his family, cannot be allowed. The very nature of Aravakasam is such that it can be claimed only by a Brahmin landlord, and further it can be claimed only if the lands are held by the Brahmin Hindu descendant, in the line of primogeniture, of a Nambudri Brahmin. S. 26 of the Regulation, which refers to commutation of customary dues on transfer, can therefore relate, in the case of non-Hindu transferees, only to Onakalcha, Alakada &c., which have nothing to do with Hindu religion.—*PER SADASIVA AIYAR, C.J.*

Jenmi and Kudiyam Regulation (Travancore).—(Concluded).

Olanpanam and Oppusuchi are synonymous and, therefore, both these fees are not awardable in the absence of proof of a special contract or custom (b). **Kuncheri Mathan v. Ramakrishnan Aiyar Ramasubba Aiyar**, 22 T.L.R. 131.

SADASIVA AIYAR, C.J., and PADMANABHA AIYAR, J.

References:—(a) 10 T.L.R. 91, 12 T.L.R. 101, B; (b) 16 T.L.R. 98, 17 T.L.R. 150, 18 T.L.R. 149, 19 T.L.R. 68, F.

Jhansi Encumbeerd Estates Act.

See ACT XVI OF 1882 (N.W.P.).

Joinder of causes of action.

Claims for alteration of rent under S. 52 and for enhancement under S. 30 of the Act may be joined in one suit—See ACT VIII OF 1885 (BENGAL TENANCY), No. 10, 11 C.W.N. 1154.

Joinder of parties.

Principles governing joinder of defendants—See CIV. PRO. CODE, No. 38, 9 Bom. L.R. 482.

Joint decree holder.

Purchase by one decree holder at execution sale—Suit by, for declaration that property purchased was joint—See CIV. PRO. CODE, No. 185, A.W.N. (1907), 166.

Joint promisors.

Liability of, to contribute, nature of—See CONTRIBUTION, No. 2, 10 O.C. 108.

Joint tenants.

Suit for rent against some of—See ACT VIII OF 1885 (TENANCY), No. 40, 11 C.W.N. 1026.

Judgment.

(1)—of a Subordinate Judge invested with small cause power—Reasons for judgment need not be given—See CIV. PRO. CODE, No. 87, 9 Bom. L.R. 327.

(2)—written when Judge was on leave—Delivery by successor in office—Validity—See CIV. PRO. CODE, No. 86, 11 C.W.N. 501.

(3) Requirements of—in appeal—See CIV. PRO. CODE, No. 271, 5 C.L.J. 348.

(4)—Improperly obtained—Effect of setting it aside—Judgment against dead man—See RES JUDICATA, No 12, 9 Bom. L.R. 274.

Jurisdiction.

1.—GENERAL.

2.—OF CIVIL COURTS.

3.—OF CIVIL AND CRIMINAL COURTS.

Jurisdiction.—(Continued).

- 4.—OF CIVIL AND REVENUE COURTS.
- 5.—OF HIGH COURTS.
- 6.—OF MUNSIFF'S COURTS.
- 7.—OF SMALL COUSE COURTS.

——1—(General).

- (1) *Power of the Court of Insolvent Debtors outside the Bombay Presidency—Vesting order—Property outside the Presidency in the hands of a Receiver—Receiver cannot be directed to hand over the assets to the Official Assignee.*

The Court for the relief of Insolvent Debtors at Bombay has no jurisdiction or power to order a receiver appointed by the Insolvency Court having jurisdiction in Amritsar, and who is in possession of an insolvent's property, to hand over the assets to the Official Assignee in Bombay.

The powers of the Commissioner in insolvency at Bombay are limited, in the first place, to the town and island of Bombay, in the next, where British subjects are concerned, to any place within the limits of the Presidency of Bombay. *Re Ganeshdas Panalal*, 9 Bom. L.R. 1098.

BRAMAN, J.

- (2) *Suit to set aside a decree on the ground of fraud—No further relief claimed.*

Save under special circumstances, a suit to set aside a decree obtained by fraud, in which no other relief whatever is claimed, cannot be maintained in any district, outside the district in which the fraud was committed and the fraudulent decree was obtained. *Umrao Singh v. Hardeo*, A.W.N. (1907), 112=4 A.L.J. 392 = 29 A. 418.

STANLEY, C.J. and BURKITT, J.

References:—13 B.L.R. app. 11; 21 C. 605; 24 C. 546; 5 C.W.N. 559; 25 A. 48; 26 C. 908; 4 C.L.R. 866, R.

- (3) *Determination of jurisdiction by plaintiff and plaintiff's allegations—Defendant's plea immaterial—Punjab Tenancy Act, Sec. 77(3), 100.*

Ordinarily, the jurisdiction is determined by the plaintiff and the allegations of plaintiff, and, in this connection, the defendant's pleas are immaterial. So, where plaintiff sues for the value of trees cut by defendant, on land alleged to belong to plaintiff and with which the defendant has no concern, but the defendant pleaded

Jurisdiction.—(Continued).

——1—(General).—(Continued).

that he was an occupancy tenant of the land and so was entitled to the trees cut, *held*, that the suit was one for a Civil Court. Although the question of occupancy rights cannot properly be determined by a Civil Court, still, the rule above mentioned for determining jurisdiction should not be departed from; and the Civil Court should simply ignore the defendant's plea, which under the law it cannot take cognizance of, leaving the defendant to sue in a Revenue Court separately for establishment of his alleged status. *Fakiria v. Dhani Nath*, 24 P.R. 1907.

JOHNSTONE and SHAH DIN, JJ.

References:—96 P.R. 1894, 11 P.R. 1895, R.

- (4) *Fraud—Decree of superior Court, if can be declared void by inferior Court.*

A Court of inferior jurisdiction is competent to declare a decree of a superior Court to be a nullity on the ground of fraud, if otherwise it has jurisdiction to entertain the suit. *Sarthakram Maiti v. Nundo Ram Maiti*, 11 C.W.N. 579.

BRETT and GUPTA, JJ.

References:—10 C. 612, 5 C.W.N. 559, 7 C.W.N. 353 = 30 C. 369, R.

- (5) *Sambalpur—Proclamation No. 2833 of 1905—Act VII of 1905—Act II of 1904—Act XII of 1887—Act I of 1868—Act X of 1897—Pending proceeding—Appeal—High Court—Judicial Commissioner—Central Provinces.*

A suit was decided by the Subordinate Judge of Sambalpur on the 8th September, 1905. The appeal was preferred to the District Judge on the 17th October, 1905. Meanwhile, the Proclamation, by which Sambalpur was transferred from the Central Provinces to Bengal, came into force on the 16th October, 1905.

Held, that, whether the suit be deemed as a pending proceeding on the 16th October, 1905, or not, the appeal from the decree of the District Judge lay to the Calcutta High Court, and not to the Court of the Judicial Commissioner of the Central Provinces (a). *Musamat Harabati v. Satyabadi Behara*, 5 C.L.J. 550 = 34 C. 636 (on review from 34 C. 223 = 5 C.L.J. 192).

MOOKERJEE and HOLMWOOD, JJ.

References:—(a) 3 C. 662; 16 C. 267, referred to.

Jurisdiction.—(Continued).

——1.—(General.)—(Concluded).

(6) Suit to establish right to attached property—See VALUATION OF SUIT, No. 2, 142 P.R. 1906=11 P.W.R. 1907.

(7) Suit against ruling Chief—Permission to sue granted in the absence of necessary conditions precedent—See CIV. PRO. CODE, No. 229, A.W.N. (1907), 95.

(8) *Chair-munkin* land attached to a well, suit for possession of—Chief Court's power to revise findings on facts relating to jurisdiction—See ACT XVI OF 1887 (PUNJAB TENANCY), No. 3, 12 P.R. 1907.

(9) Error of Court about the effect of a compromise—Its effect on a decree, the Court having jurisdiction over the matter—See EXECUTION OF DECREE, No. 9, 17 M.L.J. 165.

(10)—of the Court—Decree satisfied—Application by judgment-debtor for refund on ground of fraud—See CIV. PRO. CODE, No. 128, 4. A.L.J. 142.

(11) Failure to exercise—Omission to consider part of defence owing to erroneous view of law—High Court's power of revision—See CIV. PRO. CODE, No. 304, 10 O.C. 8.

(12) Transfer of District from one Judge-ship to another pending an appeal—See ACT XII OF 1887 (BENGAL AND N.W.P. CIVIL COURTS), No. 1, A.W.N. (1907), 53.

(13) Question of, if may be taken for the first time in appeal—Re-transfer of case withdrawn by District Judge after remand—Inherent powers of Court—What constitutes jurisdiction—Waiver of, by consent or conduct—See CIV. PRO. CODE, No. 34, 5 C. L. J. 611.

——2.—(of Civil Courts).

(1) Suit in Civil Court for compensation, when Collector refuses to make award under the Land Acquisition Act—Maintainability of such suit.

When statutory rights and liabilities have been created and jurisdiction has been conferred upon a special Court, for the investigation of matters, which may possibly be in controversy, such jurisdiction is exclusive and cannot concurrently be exercised by the ordinary Courts (a). But where a party has not been able to put forward his claim, by reason of defects and irregularities in the proceedings on, where the claim has been put forward but not adjudged, the jurisdiction of the Civil Court cannot be treated as superseded. **Maharaja Sir Rameswar Singh v. The**

Jurisdiction.—(Continued).

——2.—(of Civil Courts).—(Continued).

Secretary of State for India in Council, 11 C.W.N. 356=5 C.L.J. 669=34 C. 470.

MOOKERJEE and HOLMWOOD, JJ.

References :—(a) 10 C.W.N. 901=2 C.L.J. 359, B.L.R. (F.B.), 630 (1867), referred to.

(2)—of Civil Courts to interfere with orders of local bodies passed in bona fide exercise of discretion—S. 120 (e), Act XX of 1891 (*Punjab Municipal Act*).

Civil Courts should not interfere, save on good and substantial grounds, with the orders of local bodies passed in the bona fide exercise of the discretionary powers conferred upon them by the legislature; and in such cases, the findings of the lower Court should, except for substantial reasons, be accepted by the Chief Court when adjudicating as a Court of revision. But a Court is bound, in all these cases, to see whether the discretionary powers vested in local authorities have been, in any particular case, exercised bona fide and reasonably. Before a Court is justified in interfering, it must find that the order in question was given mala fide, or that it was ultra vires or oppressive, wanton or altogether unreasonable. **Ghulam Muhammad v. Jangbaz and Jullundur Municipality**, 58 P.R. 1907.

RATTIGAN, J.

References :—12 B. 474, 26 C. 811, 90 P.R. 1898, 27 P.R. 1901, R.

(3) Claim for pre-emption of land—Competency of Court to entertain a suit with regard to its value at thirty times the jama—Its incompetency to decree possession on payment of a sum beyond the limits of its pecuniary jurisdiction—Punjab rules under Ss. 3 and 4 of the Suits Valuation Act VII of 1888—Return or dismissal of plaint when claim found beyond jurisdiction—Practice.

B's claim for possession by pre-emption of some revenue paying land, valued Rs. 7-8-0 (according to the rule of thirty times jama), on payment of Rs. 80 or such other sum as the Court found to be its market price was entertained and decreed on payment of Rs. 750 by a third class Munsiff having pecuniary jurisdiction up to Rs. 100 only.

Held, that, the Munsiff could entertain the suit but had no jurisdiction to decree the claim for possession of the land on payment of

Jurisdiction.—(Continued).

—2.—(of Civil Courts).—(Continued).

Rs. 750 as the general principle of Law is that no Court can pass a decree for payment of a sum beyond the limits of its pecuniary jurisdiction, even as a condition precedent to getting something else done.

Held, also, that when incompetency of the Court to hear the suit is discovered after the trial of an issue, it can be dismissed for want of jurisdiction. But, following the ordinary practice, the plaint was ordered to be returned to the plaintiff for presenting to a Court of competent jurisdiction (a). **Waryam Singh v. Bela Singh**, 16 P.W.R. 1907.

CHATTERJI, J.

References :—(a) 20 P.R. 1879; 169 P.R. 1888; 58 P.R. 1902 and 46 P.R. 1906, *F.* 20 P.R. 1879 and 169 P.R. 1889, *It.*

- (4) *Claim for pre-emption of revenue paying land—Competency of Court to entertain it with regard to its value at thirty times the jama—Its incompetency to decree possession on payment of a sum exceeding its pecuniary jurisdiction—Return of plaint.*

Held, by the full Bench, that, although a suit for possession of revenue paying land on the ground of pre-emption can be entertained by a Court having jurisdiction with regard to the value of the land calculated at thirty times the jama, has no power to decree the claim on payment of a sum in excess of the limits of its pecuniary jurisdiction. **Mohammad Afzal Khan v. Nand Lal**, 79 P.W.R. 1907. (F.B.).

REID, RATTIGAN and LAL CHAND, JJ.

References :—Civil appeal 427 of 1907; 29 P.R. 1893, civil appeal 672 of 1901, *overruled*; 16 P.W.R. 1907, *F.*; 58 P.R. 1902, 24 P.R. 1903, 46 P.R. 1906, *Appr.*; 20 P.R. 1879 (F.B.) 169 P.R. 1888, *R.*

- (5) *Pre-emption of revenue paying land—Incompetency of Court to give decree for possession on payment of an amount exceeding its pecuniary jurisdiction.*

In a suit for possession of revenue paying land on the ground of pre-emption, a third class Munsiff (having pecuniary jurisdiction up to Rs. 100) has no power to pass a decree for possession of the land on payment of Rs. 550. **Gulshair Ali v. Wazira**, 79 P.W.R. 1907.

CHATTERJI J.

References :—79 P.W.R. 1907 and 16 P.W.R. 1907, *R* and *F.*

Jurisdiction.—(Continued).

—2.—(of Civil Courts).—(Continued).

- (6) *Punjab Tenancy Act (XVI of 1887), Ss. 45 and 77—Civil suit lies to get declaration that tenant is owner after dismissal of his suit under S. 45 (5) by a Revenue Court.*

Held that a suit, by a person entered in the Revenue papers as a tenant-at-will, against a person entered as landlord, to get a declaration that he is owner of the land in respect of which notice of ejectment had been served upon him under S. 45 of the Punjab Tenancy Act (XVI of 1887), is maintainable in a Civil Court even after he fails in the suit brought by him under the said section to contest his liability to be ejected in a Revenue Court, and does not fall within the purview of S. 77 (3) of the said Act. **Kehar Singh v. Gujan Singh**, 56 P.W.R. 1907.

SHAH DIN, J.

Reference :—3 P.R. 1895, *F.*

- (7) *Declaration that a certain land is the exclusive property of the appellant—Partition, private, effect of, as to property partitioned—Effect of such a declaration on the partition to be made by Revenue Court—Layd Revenue Act (N.W.P. and Oudh), S. 233—Specific Relief Act, S. 42 cl. (2).*

On a private partition between three brothers, C. S and H, the land in dispute was allotted to H, the father of the present plaintiff, and other lands were allotted to the other brothers, after which each brother held separate possession of the land allotted to him and collected the rents thereof. A mortgagee from the son of one of the brothers S sued the plaintiff for settlement of accounts. The plaintiff contended that there had been a private partition and he was not liable to account for the rent of the land in his possession. The rent Court rejected this contention and compelled the plaintiff to account. The present suit was brought by the plaintiff for a declaration that he was the owner of the land allotted to his father at the partition and that he was not liable to account. The defendant mortgagee contended that the Civil Court had no jurisdiction to make such a declaration and the suit was barred under S. 233, cl. (k) of the N.W.P. and Oudh Land Revenue Act, 1901.

Held, that the Civil Court had jurisdiction to grant such a declaration, as it was only a Civil

Jurisdiction.—(Continued).**2.—(of Civil Courts).**—(Continued).

Court which could determine questions of proprietary title.

Held, further, that the only declaration to which the plaintiff was entitled in the case was, to the effect that he alone was entitled to the profits of the land in suit, until regular partition had been made by the Revenue Court. He could not be declared to be the owner of the land in question, inasmuch as such declaration would interfere with the partition, if any, made by the Revenue Court. **Ram Autar v. Thakur Jagan Nath Bakhsh Singh**, 10 O.C. 204.

CHAMIER and SANDERS, A.J.CS.

- (8) *Suit for trees, land and—"Ungathered produce," meaning of—"Land," definition of—Rent Act (Oudh), S. 3, cl. (3)—Rent Court, suit exclusively triable by.*

The Oudh Rent Act does not limit the use or occupation of land leased to a tenant to the growing of crops. The word "ungathered produce" used in the definition of "land" as given in the rent Act, *held*, to include besides crops, trees, grass, kankar, &c.

Held, further, that a suit for possession of trees as well as of land, against a tenant holding under a special agreement, on the ground that, under the agreement, his right to possession had ceased, was one exclusively cognizable by the Rent Courts. **Thakur Din v. Hulas**, 10 O.C. 188.

SANDERS, A.J.C.

References :—12 A. 409, 9 A. 35, 8 A. 446, R.

- (9) *Order for maintenance under S. 488, Cr. Pro. Code, whether bars Jurisdiction of Civil Court.*

An order by a Magistrate under S. 488 of the Crim. Pro. Code awarding maintenance does not take away the jurisdiction of the Civil Courts. **Deraji Mallaga Naika v. Marati Kaveri**, 2 M.L.T. 344=80 M. 400.

WHITE C.J. and MILLER, J.

References :—2 Weir 615; 14 C. 276, F. 18 A. 29, D.

- (10) *Defect of—of appellate Court—Chief Court's power of interference—See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), No. 7, 125 P.R. 1907.*

- (11) *Trial of election suits—Exclusion of jurisdiction of Courts—See ACT III OF 1888*

Jurisdiction.—(Continued).**2.—(of Civil Courts).**—(Continued).

(BOMBAY MUNICIPALITY), No. 2, 9 Bom. L.R. 417.

- (12) *Suit for eviction from house on village land—See ACT IV OF 1898 (LOWER BURMA TOWN AND VILLAGE LANDS), No. 1, 3 L.B.R. 256.*

- (13) *Conflicting claims to compensation for land acquired—See ACT I OF 1894 (LAND ACQUISITION), No. 6, 5 C.L.J. 301.*

- (14) *Notice issued by Municipality for demolishing buildings—Right of person served with notice to sue the Municipality in a Civil Court—See ACT I OF 1900 (MUNICIPALITIES, AGRA AND OUDH), No. 2, 4 A.L.J. 8.*

- (15) *Jurisdiction of Mamlatdar before and after Act II of 1906—Disposal of pending proceedings—See ACT II OF 1906 (MAMLATDAR'S COURTS), No. 2, 9 Bom. L.R. 1028.*

- (16) *Suit by liquidator to recover calls on share—See ACT VI OF 1882 (COMPANIES), No. 4, 9 Bom. L.R. 825.*

- (17) *Revenue Court refusing to correct an entry in Revenue Register—No bar to suit in Civil court—See ACT II OF 1901 (TENANCY, AGRA), No. 5, 4 A.L.J. 769.*

- (18)—to question acts of Court of Wards—See COURT OF WARDS, No. 1, 4 A.L.J. 495.

- (19) *Suit for removing water-course constructed with permission of canal officer—See ACT VIII OF 1873 (NORTHERN INDIA CANAL AND DRAINAGE), No. 1, 74 P.R. 1907.*

- (20) *Appeal rejected by Commissioner of Revenue as time barred—whether Civil Court can re-open the question of limitation—See ACT XI OF 1859 (REVENUE SALE LAW), No. 6 C.L.J. 472.*

- (21) *Decree confirmed on appeal—Application for amendment by non-appelling party—Jurisdiction of first Court—See AMENDMENT, No. 1, 6 C.L.J. 542.*

- (22) *Hindu family governed by the Mitakshara Law—Jurisdiction of District Court under Act XIX of 1841—High Court's power of revision—See HINDU LAW (JOINT FAMILY), No. 1, 34 C. 929.*

- (23) *Suit to set aside Government order imposing full assessment on lands granted for religious purposes—S. 4 of Pensions Act—Jurisdiction of civil Courts—See ACT XIII OF 1871 (PENSIONS), No. 4-a, 17 M.L.J. 549.*

- (24) *Death of the defendant before the presentation of the plaint—Jurisdiction of civil*

Jurisdiction.—(Continued).

———2.—(of Civil Courts).—(Concluded).

Courts to substitute his legal representatives—See CIV. PRO. CODE, No. 206-a, 17 M.L.J. 551.

(28) Suit to set aside sale of properties subject to mortgage—value of suit—See VALUATION OF SUITS, No. 5, 22 T.L.R. 86.

(26) Security for costs against an appellant in *forma pauperis*—Jurisdiction—See CIV. PRO. CODE, No. 294-a, 17 M.L.J. 588.

———3.—(of Civil and Criminal Courts).

(1) Order for disposal of property by criminal Court—Pledge of goods received bona fide from person in possession—Contract Act, S. 178.

Where certain jewels were given to the accused to sell, but she did not sell them and her niece pawned them, and the Police seized the jewels from the pawnee and returned them to the owner, under orders of the Magistrate, who convicted the accused of criminal breach of trust, *held* that the question of the validity of the pledge and the question, whether the circumstances were such as to raise a reasonable presumption that the pawnor was acting improperly, ought to be left to a Civil Court, and the possession of the jewels ought not to be transferred in consequence of the Police having seized them. The owner having given the jewels to be disposed of for money, he is not entitled to the assistance of a Criminal Court in recovering them from a person to whom they were so disposed of. **Stephen Aviet v. King-Emperor and De Manual**, 4 L.B.R. 25.

IRWAN, J.

References :—27 M. 424, 12 B.L.R. 42, Crim. Rev. No. 1130 of 1905 (unrep. L.B.), *It*.

———4.—(of Civil and Revenue Courts).

(1) Question of proprietary title—Decision by Assistant Collector—Appeal—Agra Tenancy Act (II of 1901), Local, Ss. 177 and 199.

It is the intention of the Legislature, that all suits, in which questions of proprietary title are raised, should be decided by Civil Courts.

Where a suit for ejectment was brought in the Court of an Assistant Collector, and the defendant denied that he was a tenant, and the Court decided to determine the question of title, it ceased to be a Revenue Court and became for the moment a Civil Court. An appeal against the decision in such cases should be preferred to the District Judge. If an

Jurisdiction.—(Continued).

———4.—(of Civil and Revenue Courts).—(Continued).

appeal was preferred to the Commissioner, the Commissioner's decision was without jurisdiction and did not operate as a bar to any subsequent proceeding. **Genda v. Sukh Nath Rai**, 4 A.L.J. 86 = A.W.N. (1907), 271.

KNOX, A.C. J., RICHARDS, J.

(2) Claim for Tirini or Pasturage dues against surety based on a Rukka (note of hand)—Return of plaintiff to be presented to proper Court—Plea of non-liability raised but not put in issue.

Held, that a claim for Tirini dues against a surety, though based on a Rukka (note of hand) is cognizable by a Revenue, and not by a Civil, Court.

Held, also, that defendant's plea that the animals were exempt from payment of Tirini should have been put in issue and decided. **Mall Ram v. Ganga Ram**, 28 P.W.R. 1907.

CHATTERJI, J.

References :—30 P.R. 1895, *F*; 99 P.L.R. 1906, *D*.

(3) Suit by occupancy tenants for declaration of non-partibility of village *shamilat-jurisdiction* of Civil and Revenue Courts—Punjab Tenancy Act (XVI of 1887), S. 77—Punjab Land Revenue Act (XVIII of 1887), S. 158.

The Civil Courts can take cognizance of a suit by all the occupancy tenants in a village, against the proprietors of the village, to establish their right of grazing their cattle over the village *shamilat*, and that it should be exempted from partition. Neither S. 158, Punjab Land Revenue Act, nor S. 77 of the Punjab Tenancy Act, affects such jurisdiction. **Sundar v. Wazira**, 144 P.R. 1907.

JOHNSTONE and LAL CHAND, JJ.

(3-a)—of Civil and Revenue Courts—Suit to recover money erroneously collected for Government revenue—See ACT III of 1901 (UNITED PROVINCES LAND REVENUE), No. 7, A. W. N. (1907), 156.

(4)—of Revenue and Civil Courts—Suit on bond executed for arrears of rent—See ACT XVI of 1887 (PUNJAB TENANCY), No. 12, 41 P.R. 1907.

(5) Proceeding in Revenue Court having Jurisdiction—Commissioner on appeal holding

Jurisdiction.—(Continued).**1.—(of Civil and revenue Courts)—**
(Concluded).

the case not proved, but suggesting registration of Revenue Court's decree as that of Civil Court—Commissioner's power of reference—Chief Court's powers—See ACT XVI OF 1887 (PUNJAB TENANCY), No. 13, 45 P.R. 1907.

(6) Partition suit brought in Civil Court pending partition proceedings in Revenue Court—See ACT III OF 1901 (U.P. LAND REVENUE), No. 9, A.W.N. (1907), 172.

(7) Partition—Objections not raised before Revenue Court—Suit in Civil Court for declaration of title—See ACT III OF 1901 (U.P. LAND REVENUE), No. 4, A.W.N. (1907), 190.

(8)—of Civil and Revenue Courts—Suit for recovery of occupancy holding by the heirs of a deceased tenant—Landlord and tenant, relationship of—Declaration of right of inheritance—See ACT XXII OF 1886 (ODDH RENT), No. 1, 10 O.C. 23.

5.—(of High Courts).

- (1) *Jurisdiction of Chief Court to hear appeals transferred to it by Judicial Commissioner of North-West Frontier Province—S. 87-A—North-West Frontier Province Law and Justice Regulation (VII of 1901) as amended by Regulation (I of 1906).*

The Chief Court's jurisdiction, as a Court of Civil appeal, has been defined by its Constitutive Act, and in respect of certain special proceedings, this jurisdiction has been enlarged by Acts emanating from the same authority which constituted the Court and defined its jurisdictional limits. It has no other jurisdiction as such Court of appeal, and this jurisdiction cannot be extended extra-territorially to North-West Frontier Province by S. 87-A of the above Regulation which was made under a Statute, which is not in force in the Province in which the Court is situate, and by an authority (the Governor-General in executive Council) whose powers of legislation are exceptional, special and strictly limited under that Statute. The Jurisdiction of Chief Court cannot be extended or modified except by an Act of the Legislature. **Jodh Nath v. Sadhu Ram**, 50 P.R. 1907 (F.B.)=68 P.W.R. 1907.

REID, CHATTERJI, ROBERTSON, RATTIGAN and CHITTY, JJ.

- (2) Inspection of documents—High Court's interference in revision with the exercise of

Jurisdiction.—(Continued).**5.—(of High Courts).—(Concluded).**

discretion by inferior Courts under S. 130 of the Civ. Pro. Code—See CIV. PRO. CODE, No. 82, 17 M.L.J. 79.

(3) High Court's jurisdiction, to stay proceedings in Small Causes Court—Reference to arbitration—See ACT IX OF 1899 (ARBITRATION), No. 2, 8 Bom. L.R. 955.

(4) Injunction sought in High Court to restrain proceedings in a Small Cause Court—Power of High Court to grant the injunction—See INJUNCTION, No. 2, 34 C. 97.

(5) Injunction to restrain proceedings in a Subordinate Judge's Court—Suit in the High Court for money due on a balance of account—Power of High Court to grant the injunction—See INJUNCTION, No. 1, 34 C. 101.

(6) Extent of jurisdiction conferred by Art. 12 Letters Patent—See LETTERS PATENT (MADRAS), No. 1, 17 M.L.J. 304.

6.—of Munsiffs Courts.

- (1) *Suits under S. 77 of Registration Act to direct registration of will disposing of property worth more than Rs. 2,500 in value—Court Fees Act, S. 7, cl. 4 (c)—Article 17 (6) Article applicable—Valuation for purpose of jurisdiction—Suit Valuation Act—Jurisdiction of Munsiff's Court.*

A Munsiff has no jurisdiction to try a suit brought under S. 77 of the Registration Act to direct registration of a will, where the will in question disposes of property more than Rs 2500 in value. The suit is one to which Art. 17 (6) of the second Schedule of the Court Fees Act applies and not one to which S. 7(4)(c) is applicable that is to say, it is a suit, in which it is not possible to estimate at money value the subject matter in dispute, and which is not otherwise provided for in the Act (n).

Per WHITE, C.J.—As regards the question of value for the purposes of jurisdiction, the valuation for the purposes of Court fees is not conclusive.

Per SUBRAHMANIA Aiyar, J.—In the absence of specific statutory provisions, the jurisdiction of Courts with reference to the pecuniary value of the subject matter ought, having regard to the general considerations underlying the condition of the mofussil Courts in the country to depend upon a basis ascertainable and determinable by the Court itself wherever, that is practicable and not upon the mere will of one

Jurisdiction.—(Continued).———**6.—Munsiff's Courts.**—(Concluded).

of the parties to the litigation *viz.*, the plaintiff (b).

There is nothing in a case such as this which presents any peculiar difficulty in the way of the Court easily settling the question of the value of the interests affected by the document so as to bring it within the class of cases in which it is expedient to leave the plaintiff to put on his own valuation of the subject matter.

Per MILLER J.—In valuing the present suit for purposes of jurisdiction, the rule of valuation based on the value of the interest created by the instrument should be adopted (b). **Ramu Aiyar v. Sankara Aiyar**, 17 M.L.J. 573 (F.B.).

WHITE, C.J., SUBRAHMANYA AIYAR and MILLER, JJ.

References :—(a) 8 C. 515, 12 M.L.J. 88, F; 12 M.L.J. 87, Diss; (b) 31 C. 849, 34 C. 352, 28 A. 545, 13 M. 56, R.

———**7.—(of Small Cause Courts).**

- (1)—*of District or Small Cause Court*—*Claim for recovery of debt after cancelling an agreement to forego debt*—*Mofussil Small Cause Court Act (IX of 1887), Arts. 15 and 16 of 2nd Schedule*—*Return of plaint.*

L claimed recovery of a debt after cancelling an instrument foregoing the debt in consideration of payment of eight annas in the rupee. The Court of first instance returned the plaint, on the ground the claim was cognizable by the Small Cause Court, Lahore. The Divisional Court held, the Small Cause Court had no jurisdiction to try the case.

The Chief Court upheld the order of the Divisional Court. **Pohu Mal v. Seth Lalji**, 30 P.W.R. 1907.

KENSINGTON, J.

- (2) *Presidency Small Cause Court Act (XV of 1882), S. 28—Calcutta Small Cause Court, jurisdiction of*—*Title to tiled huts.*

The Small Cause Court of Calcutta has jurisdiction to try the question of title to tiled huts, when such a question arises in execution proceedings.

The Small Cause Court in executing the decree of another Court transferred to it, has the same powers as it possesses in regard to its own decrees.

The same Court has powers to decide all questions arising in execution of a decree under

Jurisdiction.—(Concluded).———**7.—(of Small Cause Courts).**—(Concluded).

S. 28 of Act XV of 1882. **Gunaputty Roy Agarwalla v. Thakurdye Thakurani**, 34 C. 823.

WOODROFFE, J.

References :—26 C. 778, 4 C.W.N. 470, R.

(3) A Provincial Small Cause Court, whether, has—to entertain suit for compensation for diversion of water course—See (ACT IX of 1887, PROVINCIAL SMALL CAUSE COURTS) No. 7-a, 134 P.R. 1906=18 P.L.R. 1907.

Khatedar.

Decree against—Execution—Non-payment of Government assessment—Forfeiture—Re-letting to judgment-debtor under a Kabuliyat, effect of—See CIV. PRO. CODE, No. 194, 9 Bom. L.R. 1018.

Khoti Settlement Act.

See ACT I OF 1880 (BOMBAY).

Khoti tenure.

- (1) *Khots have a right to cultivate land left dry in a river adjoining their land*—*Land Revenue Code (Bom. Act V of 1879), S. 37*—*Khot as farmers*—*Alluvion.*

Where the Khots of a village claimed a right to occupy and cultivate land left dry in the river-bed, as far as the middle of the bed opposite their Khoti village :—

Held, that they were entitled to this right, and that S. 37 of the Land Revenue Code was not a bar to such a right.

Held, further, that the soil of land covered with water may, together with the water and the right of fishing therein, be specially appropriated to a third person, whether he has land or not on the borders thereof, or adjacent thereto. **Secretary of State v. Wasudeo Sakpharam**, 9 Bom. L.R. 719=31 B 456.

CHANDAVARKAR and PRATT, JJ.

- (2) *Resignation to Khot*—See ACT I OF 1880 KHOTI SETTLEMENT, BOMBAY, No. 2, 9 Bom. L.R. 829.

Kudhi Kamini.

Suit to recover—Jurisdiction—See ACT XVI OF 1887 (PUNJAB TENANCY), No. 11, 95 P.R. 1907.

Laches.

- (1) *Delay, how far a bar to legal remedy*—*Presumption by acquiescence*—*Not pressed against an infant or a female.*

Laches.—(Concluded).

Mere delay is no bar to a legal remedy, unless it amounts to a waiver, or abandonment of the right sought to be enforced, or to acquiescence in the act complained of (a).

It is not the practice of the Courts in India, or of the Privy Council, to press, either against an infant, or a Hindu or Mahomedan female, a presumption of acquiescence in a rival claim from the mere non-contestation for a limited time of an adverse title. This principle holds good as to waiver or abandonment. Mere laches, unless it amounts to one of these three, is not sufficient to disentitle a person to equitable relief. Where there is a vested right or interest in any party, he cannot waive or abandon that right, except by acts which are equivalent to an agreement or licence. **Kazi Mahamad Gulam Reza v. Narotam Kuber**, 9 Bom. L.R. 1117.

CHANDAVANKAR and HEATON, JJ.

Reference:—(a) 29 B. 245, J'.

Lambardar and Co-sharer.

- (1) *Suit for profits—Nature of liability of two lambardars for the same village—Res judicata.*

Where there are two lambardars for the same villages, they may, as a matter of convenience, elect to divide the village between them for purposes of collection; but such division will be purely a matter of convenience and will not affect the joint liability of the lambardars to the co-sharers.

A co-sharer sued the two lambardars jointly for profits, and the Court (an Assistant Collector) held that they were not liable to be sued jointly, and dismissed the suit. The plaintiff did not appeal, but filed separate suits. *Held*, that this decision did not amount to a *res judicata* as to the lambardars' joint or separate liability, in a subsequent suit, by the same co-sharers against them, for profits of other years. **Kamta Singh v. Mukhta Prasad**, A.W.N. (1907), 47 = 4 A.L.J. 173 = 29 A. 287.

STANLEY, C.J., and BURKITT, J.

- (2) *Powers of lambardar to deal with co-parcenary lands—Lease for seven years.*

In the case of a lease of co-parcenary land granted by a lambardar, where there is any suspicion established that the lambardar has granted a long lease to the detriment of co-sharers, a heavy burden would be placed on the lessee to show that, by custom or for some other cause, the lambardar is authorized in granting

Lambardar and Co-sharer.—(Concluded)

the lease. On the other hand, where the granting of the lease is shown to be for the benefit of the co-sharers, and when the co-sharers presumably have been shown to have derived benefit under the lease, the lease should not be set aside. **Muhammad Kazim v. Mian Khan**, A.W.N. (1907), 165 = 4 A.L.J. 538 = 29 A. 554.

KNOX, J.

References:—A.W.N. (1897), 207, 20 A. 438. A.W.N. (1906), 277, 29 A. 20, R.

- (3) *Power of—to grant leases for long terms—See LEASE, No. 2, 3 A.L.J. 639 = A.W.N. (1906), 257 = 29 A. 20.*

- (4) *Suit by co-sharers against Lambardar—Lambardar entitled to 5 p. c. on the revenue—Agra Tenancy Act, S. 159—"Other dues"—See ACT III OF 1901 (LAND REVENUE), No. 6, 4 A.L.J. 781.*

Land Acquisition Act.

See ACT I OF 1894.

Land Alienation Act (Punjab.)

See ACT I OF 1900.

Landlord and tenant.

- (1) *Rights of occupancy tenants—Restriction on their right to cut fruit trees.*

The occupancy tenants possess in their lands a heritable and alienable interest of a permanent character (a). They have not, however, the sole interest. Where the old *raram* system still prevails, the landlord has a right to share in the produce, and even where it has been commuted for a money payment, he is still interested in maintaining the saleable value of his holding, which is security for his rent, in case the tenant should relinquish or forfeit it. It is for the protection of these interests that tenants have been restrained from altering the character of their lands, as by erecting on them buildings of non-agricultural nature or otherwise injuring them. Trees have been held to form part of the land (b) and trees bearing fruit crops certainly bear a greater analogy to land than to crops. Therefore, a restriction on the tenant's right to cut fruit trees is necessary for the protection of the landlord's interest. A patta containing such a restriction is valid and must be accepted by the tenant (c). **Bodda Gaddeppa v. Maharaja of Vizianagram**, 2 M.L.T. 25 = 17 M.L.J. 64 = 30 M. 155.

WHITE, C.J., and WALLIS, J.

References:—26 M. 252, 29 M. 24, *Expl. and D.* 15 M. 47, 17 M. 54, 20 M. 299, 23 M. 381,

Landlord and tenant.—(Continued).

4 M. 174, 18 M. 60. *R.* (a) 22 M. 39 (43), *R.*
(b) 11 M.I.A. 295, *R.*; (c) 13 M. 249, *F.*

(2) *Trees—Land-holder's and tenant's rights as to trees on tenant's holding.*

Held that, in the absence of special agreement, a tenant has, as against his landlord, a right to insist that, so long as his tenancy continues, the landlord shall not cut down trees standing on the tenant's holding. **Badam v. Ganga Dei**, A.W.N. (1907), 150=4 A.L.J. 452 = 29 A. 484.

RICHARDS, J.

References :—8 A. 467, 21 A. 297, 11 M.I.A. 295, *R.*

(3) *Civ. Pro. Code, S. 586—Suit of Small Cause nature—Appeal—Second Appeal—Damages suit for, for cutting wood—Defence, title by custom—Easement—Profit a prendre right of common—Custom, evidence as to—Appellate Court's power to supplement evidence—Tenant's customary right in the locality to cut wood—Trees, right in—Prescriptive right—Civ. Pro. Code. S. 30.*

An appeal lies from a decree passed in a suit of the nature cognizable in a Court of Small Causes, but there is no second appeal under S. 586 of the Civ. Pro. Code.

Where a plaintiff, a jotedar, brought a suit against a tenant for damages for cutting wood, and the defendant raised a defence of title by custom and the plaintiff also raised a reserved forest right, the suit is not in the nature of a Small Cause suit.

A Court cannot hold that the whole body of tenants had acquired an easement or right by custom, at the instance of a single tenant defendant.

It is competent to a single defendant to raise a defence of general custom, without joining the other persons interested in the custom with himself or getting himself made their representative under S. 30, Civ. Pro. Code.

If the plaintiff wishes to have the question of common right tried out, after the defendant filed his written statement, it is his duty to amend his plaint and allege that the suit was brought against the defendant personally and as representing others claiming the same right (a).

In a matter of evidence as to custom, where there is sufficient evidence to show that such a custom exists, but its limits and incidents are

Landlord and tenant.—(Continued).

not clearly before the Court, it is within the discretion of the appellate Court to allow that evidence to be supplemented, particularly when independent evidence of Government Officers is available.

A customary right of the tenants in the locality to cut wood for fuel, plough-handles, door-posts, &c., is a right of customary easement attaching to the locality, and not to any collection of individuals; such a right is known in this country, in the case of free pasturage or a fishery, what in English Law is called a *profit a prendre*. It is only under quantitative limitation as to present needs that such a customary right can be reasonably exercised (b).

A tenant cannot acquire a right by prescription against his landlord.

As a general rule of law, the property in trees growing on the land is vested in the proprietor of the land, subject to any custom to the contrary (c). **Sitab Rai v. Dubal Nagesia**, 6 C.L.J. 218.

HOLMWOOD and SHARFUDDIN, J.

References :—(a) 5 Madd. 4 (13), 56 E.R. 795 (798), *F.*; (b) 31 C. 503=8 C.W.N. 425 (P.C.), 14 B. 213 and 5 C. 945, *R.*; 9 C. 698, *Expl.*; (c) 22 C. 742, *F.*

(4) *Agreement to let a house—Breach of contract by tenant before time for performance—Measure of damages—S. 73, Contract Act.*

Where a plaintiff agreed to let a house to defendant, and placed it at the latter's disposal, but the latter refused to take the house and broke the contract, without any justification, plaintiff was held entitled to bring an action for damages for the breach.

The measure of damages is the loss of rent suffered by the landlord, after deducting such sum as he may recover from another source. and it is the landlord's duty to make reasonable efforts to secure another tenant or otherwise cover the loss, unless he sues for specific performance.

S. 73, Contract Act, does not help the defendant. The damage caused naturally arose in the usual course of things from the breach and was not indirect or remote. **Lachmi Narain v. Vernon**, 137 P.R. 1906=1 P.W.R. 1907=5 P.L.R. 1907.

REID, C.J.

Reference :—L.R. 7 Ex. 111. *F.*

(5) *Ejectment—Notice to quit—Tenant from year to year—Tenant-at-will—Demand of*

Landlord and tenant.—(Continued).

possession from tenant-at-will necessary—Relationship of landlord and tenant—Demand of rent if creates relationship—Offer and acceptance.

The case of *Ram Narain Sahu v. Mangra Urao (a)* was not intended to lay down that, where the defendant is a tenant, the tenancy has not to be determined before the institution of a suit for ejectment.

Per MOOKERJEE, J.—Upon general principles a suit for ejectment of a tenant cannot be maintained, unless the tenancy has been determined, *i.e.*, unless there has been a previous notice to quit or a demand for possession.

The rule laid down in *Sulata Dass v. Jaiu Nath Dass (b)* applies in the case of a tenant from year to year, but a mere demand for possession is sufficient for a tenant-at-will.

A mere demand for rent is not sufficient to create the relationship of landlord and tenant. It is at most an offer of tenancy. **Deo Nandan Pershad v. Meghu Mahton**, 11 C.W.N. 225 = 5 C.L.J. 181 = 34 C. 57.

RAMPINI and MOOKERJEE, JJ.

References :—(a) 4 C.W.N. 792, R. (b) 8 C.W.N. 774, R.

- (6) *Wajib-ul-arz—Permission to tenants to transfer only the materials—Sale of house in execution of decree—Purchaser, no right to occupy against consent of landlord.*

Held, that, where the *wajib-ul-arz* of the village gave the tenants, residing in that village, only a right to sell or mortgage the materials of their house, a purchaser of the house in auction sale, in execution of decree against the tenant, could not acquire a right to occupy the house, without the permission of the landlord. **Raja Mohammad Mehdi Ali Khan v. Gopal Das**, 10 O.C. 4.

GRIFFIN, J.C.

- (7)—*Rights of tenants to transfer their dwelling house—Site of house, transfer of—Denial of landlord's title—Forfeiture—Wajib-ul-arz, provisions of, to govern tenants of abadi—Transfer of Property Act, S. 117.*

The *Wajib-ul-arz* of a village expressly conferred, upon the tenants residing in the village, a right to transfer only their dwelling houses and not the sites thereof. A tenant, in transferring his house in an abadi, included also the site. *Held*, that S. 111 (g) of the Transfer of

Landlord and tenant.—(Continued).

Property Act did not apply, and the landlord was not entitled to eject him from the site, on the ground that he had denied the landlord's title, and thereby incurred a forfeiture of his right to occupy the site. **Ram Charan v. Babu Sheo Dayal**, 10 O.C. 31.

SCOTT and CHAMIER, J.C.S.

- (8) *Co-tenants — Relinquishment by some, effect of—Bengal Tenancy Act (VIII of 1885), Ss. 20 (4), and 21—Payment of rent—Person in possession as owner—Creation of tenancy.*

Where some lands were held by several occupancy-riayats jointly and some of them relinquished in favour of the landlord :

Held, the relinquishment did not operate by way of enlarging the rights of the raiyats, who remained on the land, by giving them an interest over the whole holding. They could claim a right only over the share originally held by them Ss. 20 (4) and 21 of the Bengal Tenancy Act did not apply to the case.

Payment of rent and acceptance thereof do not create the relationship of landlord and tenant, when the person to whom the payment is made and who accepts the same is not only not the real owner, but not in possession as *de facto* proprietor in good faith (a). **Peary Mohun Mandal v. Radhika Mohun Hazra**, 5 C.L.J. 9.

MACLEAN, C.J., and BODILLY and MOOKERJEE, JJ.

Reference :—(a) 20 C. 708, D.

- (9) *Rights of Zemindars in respect of house-sites and grove-lands—Wajib-ul-arz—Construction of document.*

The plaintiffs purchased six plots of land consisting partly of groves and partly of land, formerly the sites of houses, but since brought under cultivation, and, failing to get their names recorded as absolute owners of the plots, brought a suit virtually for a declaration of their proprietary title.

It was shown in evidence that the inhabitants of the village in which the plots in suit were situated were in the habit of selling and transferring their houses. The *Wajib-ul-arz* set forth that the occupiers of houses had this power, but all through the entries the Zamindar was recognized, and it was stated that, if a new house was to be built with the permission of the Zamindar, it must be obtained. The entry in the *Wajib-ul-arz* as to groves was to

Landlord and tenant.—(Continued).

the effect that isolated trees and clumps of bamboos planted by tenants might be cut by them ; as to rent-free groves, if the trees should die out and the land be brought into cultivation, rent must be paid, and that, if a new grove was to be planted, the leave of the Zamindar must be obtained.

Held, that the inference of law derivable from the facts stated above was that the plaintiffs were not the absolute owners of the plots purchased by them. **Kishan Kunwar v. Fateh Chand**, A.W.N. (1906), 307=4 A.L.J. 38=29 A. 203.

KNOX and RICARDS, JJ.

- (10) *Shikmi tenant, liability of—Rent due from the tenant-in-chief—Rent Act (Oudh). S. 72—Right of distraint.*

Held, that a landlord is entitled to distrain the crop of a *Shikmi* (sub-tenant) in respect of rent due by the tenant-in-chief. **Girdhari Lal (Lala) v. Darshan**, 10 O.C. 41.

CHAMBER, J.C.

Reference :—A.W.N. (1901), 182, R.

- (11) *Dispossession of lessee by another lessee, and not by landlord—Suspension of rent.*

A lessee cannot suspend payment of rent, if he has been dispossessed of any of the lands covered by the *Kabulait*, not by the landlord, but by other lessees under him. **Kali Prasanna Khasnabish v. Mathura Nath Sen**, 34 C. 191.

BRETT and SHREFFUDIN, JJ.

References :—24 C. 296 and 28 C. 188, R.

- (12) “ *Holding over* ” meaning of—*Presumption—Suit for ejectment—Delay in suing—Record of evidence in language of Court—S. 578, Civ. Pro. Code—S. 49, Bengal Tenancy Act.*

There is no authority for the proposition that simply because a landlord does not institute a suit for ejectment for a time after the expiry of the lease, the presumption is that the tenant was allowed to hold over. The expression ‘ *holding over* ’ means that the relation of landlord and tenant continued with the assent of both parties, and the overt acts, by which the relation might be continued, are either the receipt of rent by the landlord, or his assenting to the continuance of the tenancy by other acts or words.

A mere delay, therefore, in instituting the suit for ejectment, without notice to quit, is no

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reason for dismissing the suit, on the ground that the lessee was allowed to hold over.

Where the suit is one for ejectment, and not one for rent, the omission of the Court to record the evidence in the language of the Court is merely an irregularity, which may be cured by the application of S. 578, Civ. Pro. Code. The analogy of a case tried summarily under the Crim. Pro. Code, is not applicable to Civil suits, if there be no defect of jurisdiction. **Ratan Lal Gir v. Farshi Bibi**, 34 C. 396=11 C.W.N. 826.

MITRA and CASPERSZ, JJ.

- (13) *Decree for consolidated rent of several tenures, whether binds tenures—Decree whether obtained against sole recorded tenant—Proof—Onus—Right of auction-purchaser of share in tenure—Chotanagpur Landlord and Tenant Procedure Act (I, B. C. of 1879), Ss. 123, and 125.*

A decree for the consolidated rent of several tenures held by the same tenants does not bind the tenures or any of them.

Where a tenure was sought to be sold in execution of a decree for rent obtained against one of the tenants, after the shares of the other tenants had passed by auction sale to a stranger, on the allegation that the tenant, against whom it had been obtained, was the sole recorded tenant of the landlord, *held* that, whether this was so or not was a matter specially within the knowledge of the landlord, and the *onus* was on him to prove it. **Baikanta Nath Roy v. Thakur Debendro**, 11 C.W.N. 676.

GEIDT and ORMOND, JJ.

- (14) *Suit in which Hindu father alone is party—Question whether he represents his co-parceners—Decree for ejectment against tenant for converting agricultural holding into one of a different nature—Effect of decree on tenant's minor son not party to suit—Suit by son claiming tenancy—Res judicata.*

The question whether a Hindu father, in a particular suit in which he alone of the family is a party, represents his co-parceners, is a question to be decided with reference to the circumstances of the case.

The construction of a building, calculated to convert an agricultural holding into one of a different nature, could only give rise to an action, on the footing that it was an improper use of the tenure, and *prima facie* a person

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making such improper use could not be allowed to represent a minor interested in the property, and not responsible for the wrong. So, where a zemindar got a decree to eject a tenant, on the ground that he had forfeited his right to occupy the land, by erecting a building upon it, which was not suitable to an agricultural holding, the tenant cannot be held to represent the interests of his minor son, who was not a party to that suit; and the decision therein cannot bar a subsequent suit by the son, to enforce his right to the same tenancy. **Sri Raja Yaratharaja Appa Row Bahadur v. Sunkara Vencatadri**, 2 M.L.T. 86 = 17 M.L.J. 197.

SUBRAMNI AIYR and MILLER, JJ.

(15) *Occupancy holding, transfer of—Consent of landlord subsequent to sale—Recognition.*

The case of *Bhiram Ali v. Gopi Kanth* (a) did not lay down the universal rule that no sale of a non-transferable occupancy holding, in execution of a decree, would be valid, if the consent of the landlord were not obtained prior to the execution proceedings. If a settlement is made by the landlord with the purchaser, as soon as can reasonably be expected after the sale, and where the landlord afterwards recognises the purchaser and accepts rents from him, the sale is valid in law. **Dwarkanath Pal v. Tarini Sankar Roy**, 5 C.L.J. 294 = 34 C. 199 = 11 C.W.N. 513.

BRETT and SHARFUDDIN, JJ.

References:—(a) 24 C. 355, *expl.* 9 C.W.N. 972, 26 C. 727, *appr.*

(16) *Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 3—Limitation—occupancy raiyat—Co-sharer landlord—Auction purchaser.*

At a sale held in execution of a decree for arrears of rent obtained by a co-sharer landlord against a registered tenant, another co-sharer landlord purchased the holding, and, in obtaining delivery of possession, evicted a person other than the judgment-debtor. The person dispossessed sued to eject the auction purchaser.

Held, that Sch. III, Art. 3 of the Bengal Tenancy Act had no application to the case, as the dispossession by the defendant was in his character of auction purchaser, and not of

Landlord and tenant.—(Continued).

landlord (a). **Mahomed Khalil v. Hirendra Nath Bhattacharya**, 5 C.L.J. 650.

RMAPINI and MOOKERJEE, JJ.

References:—(a) 2 C.W.N. 175, 6 C.W.N. 333, *followed*.

(17) *Land acquisition—Apportionment of compensation—Landlord and occupancy raiyat—Principle—Rent, when enhancible.*

If the rent payable by a tenant is enhancible, the landlord is entitled to something for that chance of enhancement; but that again is difficult to estimate by a money value.

The principle upon which the compensation money ought to be divided laid down (a). **Bhupati Roy Chowdhury v. The Secretary of State**, 5 C.L.J. 662.

MACLEAN, C.J., and FLETCHER, J.

References:—(a) 30 C. 801, *F.* 17 C. 144, *explained and disapproved*.

(18) *Hindu Law—Mitakshara—Succession—Whole-blood—Half-blood—Uncle—Inheritance—Co-sharers—Alternative claim—Cess return—Cess Act (IX of 1880 B. C.), S. 20.*

Under the Mitakshara school of Hindu Law, an uncle of the whole-blood is entitled to succeed in preference to an uncle of the half-blood (a).

A suit is maintainable by one of several joint landlords for recovery of balance of rent due from a tenant, and, in the alternative, for recovery of sums, which may have been collected by his co-sharers in excess of their legitimate share. So far as the claim against the co-sharers is concerned, S. 20 of the Cess Act has no application (b). **Sham Singh v. Kishun Sahai**, 6 C.L.J. 190.

BRETT and MOOKERJEE, JJ.

References:—(a) 19 A. 215, *Appr.*; 24 B. 317, *Diss.*; (b) 4 C. 350, *Appl.*

(19) *Denial of title—Ejectment—Permanent constructions by tenant—Mandatory injunction—Interest acquired after suit.*

The ancestors of the defendants, who were patwaris of the village, were allowed by the landlord to occupy a plot in the village *abadi* and to erect a dwelling-house thereon. The defendant himself was a *karinda* in charge of making collections of rent in this village on behalf of the plaintiff. About sixteen years before, the defendant's ancestor ceased to be

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the patwari of the village, and about twelve years ago, the defendant ceased to be in the plaintiff's service. But in the meantime the defendants had constructed certain permanent buildings on the land about twelve years prior to the institution of the suit. The defendants set up a custom, by virtue of which tenants holding houses in the *abadi* of the village were owners of the land also.

The plaintiff thereupon sued for the ejectment of the defendants and the demolition of the buildings constructed by them. During the pendency of the suit, the defendants purchased part of the equity of redemption to which the heirs of one Madhi Hasan were found to be entitled in the village, the plaintiff being mortgagee thereof and the owner of the remainder of the village. They brought a suit for redemption, which was decreed by the High Court.

The land was allotted to them in consideration of their performing services as patwari and *karinda*, and though they had ceased to occupy those offices, the land was still held by them. *Held*, that they were tenants-at-will, and were liable to ejectment.

That the statements made by them amounted to a denial of the landlord's title, which entitled the plaintiff to treat the lease as determined and to sue for the reliefs claimed by him.

That the erection of the permanent buildings did not create an estoppel against the plaintiff. The principles laid down in *Beni Ram v. Kundan Lal* (a) apply even where a lease has not expired.

That the interest acquired by the defendants, during the pendency of the suit, as holders of a part of the equity of redemption, should not be taken into consideration in determining the reliefs to which the plaintiff was entitled, but that the decree for ejectment should be made without any prejudice to the rights which the defendants might have so acquired. **Budh Singh v. Parbati**, 4 A.L.J. 556=A.W.N. (1907), 231=29 A.652.

KNOX, A.C.J., and DILLON, J.

Reference :—(a) 21 A. 496, *Principle applied*.

(20) *Bhowli and Nagdi rent—Commutation—Reconversion*.

Where there has been a formal commutation of *bhowli* into *nagdi* rent, neither the landlord nor the tenant can, without the consent of the other, revert to *bhowli* (a).

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Where, however, there have been occasional deviations, into *Nagdi* not intended to be permanent, the landlord is entitled to claim *bhowli* rent. **Dursan Singh v. Mussumant Fashihun**, 6 C.L.J. 369.

MITTER and TREVELYAN, JJ.

Reference :—(a) 21 W.R. 438, F.

(21) *Ejectment—Notice to quit—Annual tenancy created before Transfer of Property Act—Bengali Calender, six month's notice under, if sufficient—Transfer of Property Act (IV of 1882), Ss. 106 and 107—Unregistered lease, not for agricultural or manufacturing purpose—Monthly tenancy, though rent annual*.

In the case of a tenancy, not governed by the Transfer of Property Act, a six months' notice calculated according to the Bengali Calendar was held to be sufficient to terminate the tenancy, the tenancy appearing to have been regulated according to the Bengali year.

When a tenant holds under a lease, which is not written or registered, and is governed by the Transfer of Property Act, and the land was not let out for a manufacturing or agricultural purpose, the tenancy must be taken to be a monthly one terminable by 15 days' notice, even though the rent appears to have been payable annually. **Detendra Nath Bhowmik v. Syama Prosanna Bhowmik**, 11 C.W.N. 1124.

RAMPINI and WOODROFFE, JJ.

(22) *Ejectment suit—Denial of tenancy and possession—Plea of want of notice to quit—Estoppel by pleading*.

A defendant in an ejectment suit, who denied the plaintiff's title and the lease, alleging possession of the property in a third party, cannot contend that the plaintiff ought to have served him with a notice to quit. **Kizhakkin-yakath Abdulla Naha v. K. Moldin Kutti**, 17 M.L.J. 287=2 M.L.T. 368.

BODDAM and MILLER, JJ.

Reference :—1 M.L.J. 218, F.

(23) *Permanent tenure—Tenure, devolution of—Tenant, acceptance of rent from—Transfer, recognition of—Dakhilas to dakhildar, effect of—Pottah, new, effect of*.

When a tenure or holding has existed for many years, held upon a nominal rent never enhanced, has been the subject of transfer and succession, and rent has been accepted from new tenants after devolution,

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held: that the only inference possible is that the tenant held a permanent tenure.

The fact that the deeds of transfer recite that the transferee, on paying expenses to the landlord, and on causing expunction of the transferor's name, shall take a pottah in his own name, does not go against the presumption that the tenure is permanent (a).

When, upon a transfer of a tenure or a holding by a tenant, the landlord receives rent from the transferee and grants *dakhilas*, which describe the rent paid as the rent of the holding, and the person paying as occupier of the holding, and as paying on his own account, there is a sufficient recognition of the transferee as tenant; it is not necessary that the transferee should be expressly described as tenant. **Naba Kumari Debi v. Behari Lal Sen**, 6 C.L.J. 122 (P.C.)=11 C.W.N. 865=4 A.L.J. 570=9 Bom. L.R. 846=17 M.L.J. 397=34 C. 902=2 M.L.T. 433.

LORD ROBERTSON, LORD COLLINS and SIR ARTHUR WILSON.

References:—(a) 12 B.L.R. 229; 31 I.A. 144=32 C. 41; 31 I.A. 149=32 C. 51, F.

(24)—*Onus of proof—Non-payment of rent for 50 years—Suit for rent.*

Mere non-payment of rent, though for nearly fifty years, would not affect the landlord's right to rent, where the tenant gave a *kabuliat* in favour of the landlord or his predecessor in title.

In a suit for rent, in order to release the tenants from their liability under the contract, they must show by clear and conclusive evidence that that contract has been determined, or they must satisfy the Court that the parties never intended that the contract should be acted upon (a). **Bama Charan Chowdhury v. Administrator-General of Bengal**, 6 C.L.J. 72.

MACLEAN, and HOLMWOOD, J.

Reference:—(a) 4 C. 814=3 C.L.R. 119, F.

(25) *Relationship of—Denial of relationship—Dismissal of former suit—Res judicata—Ejectment.*

Where a former suit for rent by the plaintiff against the defendant is dismissed on the ground that the relationship of landlord and tenant did not subsist between them, and the plaintiff afterwards sues to eject the defendant, *held*, that the plaintiff has no option but to treat the defendant as trespasser and to sue him for ejectment, as the plaintiff will be met

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by the plea of *res judicata* if he should sue the defendant as tenant. **Khata Mistri v. Sadruddi Khan**, 34 C. 922.

RAMPINI, A.C.J. and SHARFUDDIN, J.

References:—2 C.W.N. 755; 6 C.W.N. 575; and 3 C.L.J. 201, F. 9 C.W.N. 928, R.

(26) *Non-transferable occupancy holding, transfer of—Abandonment—Permissive possession under transferee—Landlord's suit for khas possession.*

Where a tenant having a right of occupancy not transferable by custom, had given up to the purchaser possession of all the culturable lands of the holding, but remained in possession of homestead lands only by permission of the purchaser,

Held that this was sufficient to indicate that the raiyat had abandoned his holding, and, in such a case, the landlord is entitled to eject the raiyat and the purchaser and get *khas* possession. **Sallabala Debi v. Sriram Bhattacharji**, 11 C.W.N. 873.

BRETT and SHARFUDDIN, JJ.

(27) *Tenants under Inamdars—Permanent lease—Presumption of occupancy right.*

As the position of Inamdars differs materially from that of Zamindars, the presumption, that persons becoming tenants of Zemindars, after the Permanent Settlement, become occupancy tenants, does not apply to persons who become tenants to Inamdars. **Marapu Tharalu v. Telukula Neelakanta Behara**, 30 M. 502=2 M.L.T. 470.

BODDAM & WALLIS, JJ.

Reference:—23 M 318 R.

(28) *Suit to recover rent—Relationship of—Contract—Privity of estate.*

In a suit to recover rent, the plaintiff must establish that the relationship of landlord and tenant existing between the parties rests either on contract or privity of estate. **Manjappa v. Venkatesh**, 8 Bom. L.R. 988=31 B. 159.

JENKINS, C.J., and BEAMAN, J.

(29)—*Construction of deed—Cess, liability to pay—Cess Act (IX B. U. of 1880), S. 41—Mokurari lease.*

A perpetual *mokurari* lease implies that the tenancy is permanent, heritable and transferable, and that the rent is fixed in perpetuity.

It is open to the Zemindar and the tenureholder to contract themselves out of the provisions of S. 41 of the Bengal Cess Act.

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Where in a perpetual mukurari lease the rent was fixed by a clause which runs:—"At varying *jamas*, to wit, at an annual uniform *jama* of Rs. 1,580 from 1,284 to 1,291 (Fasli), and at an annual uniform consolidated *jama* of Rs. 1,585 of the current coin from 1292 (Fasli) together with *abwab* such as *selami* for Dusserah and Holi, Purkha, Sair, Road cess, Public Works cess, &c., all of which are included in that very sum of Rs. 1,585,"

Held, that the contract does not provide for the contingency which happened in this case, namely, an increase in the amount of cesses levied by the State.

Held, also, that if any additional cess is imposed or if the amount of cess is increased, the incidence of the new burden must be regulated according to the statute. **Mahanand Sahai v. Musmat Sayedunissa Bili**, 12 C.W.N. 154.

MOOKERJEE and CASPERSZ, JJ.

(30) Raiyat transferring non-transferable holding and taking under-lease under transferee—Forfeiture—Right of under-riyat to recover possession—See ACT VIII OF 1885 (BENGAL TENANCY) No. 21, 11 C.W.N. 811.

(30-a) Eviction by a person with paramount title—Damages for breach of covenant for quiet enjoyment, suit for—See CIV. PRO. CODE, No. 43, 3 N.L.R. 80.

(30-b) Distraint for rent—Right to sue for rent pending distress—Sale after judgment in suit—Sale for non-compliance with excessive demand—Legality—See ACT VIII OF 1865 (RENT RECOVERY, MADRAS,) No. 5, 17 M.L.J. 294.

(31) Suit for possession against lessee dismissed as non-maintainable—Subsequent suit for declaration—Cause of action—See CIV. PRO. CODE, No. 46, 10 O.C. 44.

(32) Collector's order setting aside his previous order for the issue of warrant for ejecting tenant—Whether appeal lies to District Court against the order—See ACT VIII OF 1865 (RENT RECOVERY, Madras), No. 14, 2 M.L.T. 106 (F.B.)

(33) Suit for rent and for a declaration as to the propriety of *patta* tendered—Small Cause suit—Second appeal—See CIV. PRO. CODE, No. 296, 1 M.L.T. 314 = 16 M.L.J. 477 = 30 M. 101.

(34) Absolute occupancy tenant's right to transfer holding—See ACT XI OF 1898 (CENTRAL PROVINCES TENANCY), No. 2, 3 N.L.R. 40.

Landlord and tenant.—(Continued).

(35) Ejectment suit by some only of the landlords not maintainable—See PARTIES, No. 1, 20 P.L.R. 1907.

(36) Suit by landlord for rent—Defendant's plea that landlord is only a *benarqidar*, validity of—See EVIDENCE ACT, No. 26, 141 P.R. 1906 = 18 P.W.R. 1907.

(37) Adverse possession of site for over 12 years—Revocation of license—House of a permanent character—See EASEMENTS ACT, No. 5, 3 A.L.J. 760.

(38) Agreement dividing holdings—Suit for possession of a moiety—See ACT II OF 1901 (N. W.P. TENANCY), No. 4, 3 A.L.J. 735 = 29 A. 66.

(39) Acceptance of rent by the landlord creates the relationship of—between the parties—See ADVERSE POSSESSION, No. 3, 5 C.L.J. 62.

(40) Suit by landlord for recovery of drainage charges from tenant—Time from which limitation runs—See LIMITATION ACT, No. 88, 5 C.L.J. 19.

(41) Suit for recovery of occupancy holding by the heirs of a deceased tenant—Declaration of right of inheritance—See ACT XXII OF 1886 (OUDH RENT), No. 1, 10 O.C. 23.

(42) Rent-suit—Set-off by tenant—Bengal Tenancy Act, S. 67—Interest—See CIV. PRO. CODE, No. 79, 11 C.W.N. 215.

(43) Sale of part of permanent raiyati holding—Landlord aware of sale, though transferee not recorded in his *sherista*—Suit for rent—Decree against recorded tenant, effect of—Purchase of part of tenure, if an incumbrance—See ACT VIII OF 1885 (BENGAL TENANCY), No. 7, 11 C.W.N. 217.

(44) Rent paid by tenant, whether landlord could appropriate as for interest—See ACT VIII OF 1885 (BENGAL TENANCY), No. 17, 11 C.W.N. 110 = 5 C.L.J. 69.

(45) Evidence as to whether tenant held lands under *nakdi* or *bhaoli* system of rent—See EVIDENCE ACT, No. 7, 11 C.W.N. 703.

(46) Government as tenant paying assessment for landlord—Right to recover amount—See CONTRACT ACT, No. 27, 17 M.L.J. 337.

(47) Sale of occupancy tenure by tenant to landlord, validity of—See OCCUPANCY RIGHTS, No. 2, 10 O.C. 235.

(48) Suit by landlord to recover possession of land after tenancy—Trespasser getting into possession during tenancy—Jurisdiction of Mamlatdar's Court—See ACT II OF 1906

Landlord and tenant.—(Concluded).

(MAMLATDAR'S COURTS ACT), No. 3, 9 Bom. L.R. 1179.

(49) Suit for possession by tenant against landlord and persons claiming melwaram rights under him—Court-fees—See COURT FEES ACT (VII of 1870), No. 6, 17 M.L.J. 478.

(50) Contract between superior proprietor and inferior proprietor as to amount of revenue—Enhancement of revenue at subsequent settlement—Whether inferior proprietor liable to enhanced revenue—See ACT III of 1901 (U.P. LAND REVENUE), No. 2, 4 A.L.J. 807.

Land Registration Act.

See ACT VII of 1876 (BENGAL).

Land Revenue Assessment Act.

See ACT I of 1876 (MADRAS).

Land Revenue Act.

See ACT XIX of 1873 (N.W.P.) and ACT III of 1901 (U.P.).

Land Revenue Code (Berar).

(1) *Ss. 4 and 205—Pre-emption—Sale of separate divided share in a survey number.*

The right of pre-emption, under the Berar Land Revenue Code, is not to be limited to cases, where the pre-emptor and vendor are tenants-in-common owing undivided shares of a survey number. It extends also to cases, where the pre-emptor and vendor are owners of separate divided shares in the survey number, if they have their rights derived from a single original title. **Babu v. Maruti**, 3 N.L.R. 135.

BATTEN, A.J.C.

(2) *Ss. 69 and 205—Exchange—"Relinquish, ment for valuable consideration"—Right of pre-emption.*

Where a co-occupant transfers his share, partly in exchange for another field and partly for cash, the transaction, both according to Hindu Law and the Transfer of Property Act, is an exchange.

"A Relinquishment in favour of a specified person for valuable consideration", in S. 205 of the Berar Land Revenue Code, means a transfer for valuable consideration of the kind described in S. 69. Such a transfer is usually described as a transfer by Razinama and Kabuliyat (a).

A suit for pre-emption on a transfer by way of exchange of a divided share in a survey num-

Land Revenue Code (Berar).—(Concluded).

ber does not lie. **Babu v. Maruti**, 3 N.L.R. 138.

BATTEN, A.C.J.

References:—(a) II Berar Law Journal 49; 22 Ch. D. 142, *It.*

(3) *Ss. 206 and 211, sub-sec. 1, cl. (a)—Pre-emptor—Notice of foreclosure—Person entitled to such notice—Objection raised by mortgagor for want of notice to co-owner.*

The only person, who has a right to object to the failure to give notice, under S. 206 of the Berar Land Revenue Code, in the chapter relating to pre-emption, is the person having the right of pre-emption.

Where a mortgagee, having foreclosed, neglects to give the required notice to a co-occupant of the mortgagor, the latter can sue for pre-emption under cl. (a) of sub-sec. 1 of S. 211. But the mortgagor cannot plead a want of notice to the co-occupant as a bar to the foreclosure decree being made absolute. **Gangoo v. Sakaram**, 3 N.L.R. 84.

BATTEN, A.J.C.

Land Revenue Code (Bombay).

See ACT V of 1879 (BOMBAY).

Lease.

(1) *Construction—Five years' term with option to lessee to hold over indefinitely on the same conditions—Nature of tenancy after expiration of term—Ejectment—Notice—Unequal bargain—Undue influence—Pleadings—Construction of doubtful grant.*

A lease was executed for a term of five years giving the lessee the option of quitting the premises during the continuance of the term on giving a month's previous notice to quit. There was a further stipulation that the lessee would be entitled to hold and possess the premises on the conditions reserved, even after the expiration of the term and so long as he desired to do so, without interruption or hindrance on the part of the lessor.

Held,—On a construction of the lease, that the right to hold over did not create in the lessee the interest of a tenant from month to month from the expiration of the term of five years, and the lessor could not, after the expiration of the said term, eject the lessee by giving him notice to quit as in the case of a monthly tenancy. The lessee was entitled to hold and possess the premises all his life or

Lease.—(Continued).

until due surrender by him, during his lifetime, by means of a month's notice (a).

A doubtful grant must be construed in favour of the grantee. **F.W. Higgins v. Nobin Chunder Sen**, 11 C.W.N. 809.

MITRA and CASPEISZ, JJ.

Reference :—(a) 4 B. 424, followed.

(2) **Lambardar**—Power to grant a long lease—Lease for seven years.

A *lambardar* has no power to grant a lease of co-parcenary land beyond such term as the circumstances of the particular case require (a).

In this case, the *lambardar* had granted a lease for seven years, which was set aside. **Chattray v. Nawala**, 3 A.L.J., 639 = A.W.N. (1906), 257 = 29 A. 20.

STANLEY, C.J. and KNON, J.

References :—(a) A.W.N. (1897), 207 and 20 A. 438, F.

(3) *Construction of*—Mokarari or permanent—Heritable, transferable and perpetual—Reservation of right, absence of—re-entry, right of—Forfeiture—Mineral rights, lessee's title to—Language, unambiguous—Oral evidence, admissibility of—Intention of parties—Transfer of Property Act, Ss. 108 and 114—Mines, working of, statutory prohibition of—"Mai-hak-hakuk," or with all rights, meaning of.

A contract to sell or grant a lease of land will generally include the entire *solum*, from the surface down to the centre of the earth, and will, therefore, include the mines, quarries and minerals beneath or within it (a).

When mines or minerals form a part of the whole unsevered inheritance, an owner in fee-simple possesses, in all freehold lands, an unrestricted right to work the mines in his estate, and his conveyance, in the absence of an indication to the contrary, grants all mines and minerals therein; in other words, a conveyance of land passes the entire estate, and carries with it all the grantor's right and title to, and interest in, the minerals, unless they are expressly reserved, by the terms of the instrument, or have been previously granted. To ascertain the rights of the grantee, the language of the instrument and the intent of the parties, as well as the estate held by the grantor have to be taken into consideration (b).

When the terms of a grant are unambiguous, oral evidence is not admissible to restrict its scope and operation; and in such a case, the

Lease.—(Continued).

question is, not what the parties to the deed may have intended to do by entering into that deed, but what is the meaning of the words used in that deed (c).

Where a lease purports to transfer a whole village, and the grant is expressly of all rights of the grantor in the village, and the grantee, his sons and grandsons are to hold the property, for rent fixed in perpetuity, and the grantor only reserves the right to cancel the lease for non-payment of rent.

Held, that the interest in the land, which the grantor intended to transfer to the lessees was heritable, transferable and perpetual, and the lease was, in its essence, a permanent lease, held at a rent fixed in perpetuity; and the grantor parted with all his rights, in favour of the grantee, for all time to come, for a fixed rent, subject to a possibility of re-entry, in the event of forfeiture for non-payment of rent; and the grant was, not merely of the surface rights, but also passed the right of the grantor in the under ground minerals.

A lease does not cease to be a lease in perpetuity, because there is a forfeiture clause; provisions for the forfeiture of leases, for non-payment of rent, are intended merely as a security for the payment of the rent.

Where a lease contains a condition that the lessor may re-enter and put an end to the lessee's estate, or even that the lease should be void, upon the lessee's failure to pay the rent at the time specified, a Court of equity will relieve the lessee and set aside a forfeiture incurred by his breach of the condition, whether the lessor has or has not entered and dispossessed the tenant (b). **Megh Lal Pandey v. Raj Kumar Thakur Giridhari Singh**, 5 C.L.J. 208 = 11 C.W.N. 527 = 34 C. 358.

RAMPINI and MOOKERJEE, JJ.

References :—(a) 33 C. 54, 3 C.L.J. 59, 33 C. 511 (580), 3 C.L.J. 306, *R.*, 7 B. 109, 2 C.L.J. 20, 2 C.L.J. 408, 33 C. 203, 9 C.W.N. 255, *Expl.* and *D.* (b) 4 C. 327, 24 C. 440, 2 B. H. C. A. C. 66, *R.*

(4) *Construction*—Chowkidari chakran land—Estoppel—"Tainati peon" and Chowkidar, distinction between—Performance of Fouzdari duties—Primary and secondary evidence—Evidence Act (I of 1872), Ss. 63 and 63 (4)—Lease and counterpart—Discrepancy—Presumption—Contract, dispute as to applicability of terms of—"Bazeaft."

Lease.—(Continued).

Where the plaintiffs, in support of their title, relied on one of two leases, executed on the same date, in the Court of first instance, and the other in the Court of appeal, they are not estopped from relying on the first lease in the High Court.

Where under the terms of the lease, a lessee is to take possession of the whole of the *mal*, *khamar*, *hasil*, *patit* lands, the *chakran* lands in the possession of Tainati peons, *Jhi*, *Bil Jalkar*, *Fulkar*, gardens, tanks, &c., but not the preserved forest, the resumed Thanadari lands and the *Sabaik* resumed *chakran* lands and undertook the performance of Fouzdari duties;

Held, that the grantor transferred only rent-paying lands which do not include *Chowkidari chakran* lands.

A "Tainati" peon is a peon appointed by the proprietor of an estate to assist in collecting the rent or revenue from the cultivators. He is entirely distinct from a Chowkidar. He is a private servant of the Zemindar and the lands held by him for the performance of his services constitute an ordinary service-tenure. A Chowkidar has to perform Police services for the Government and also to render such services to the Zemindar personally as might have the sanction of law or usage (a).

By the use of the expression "the lessee undertook the performance of Fouzdari duties" in the lease, the Zemindar intended to throw upon the lessee the performance of duties for the preservation of the public peace, which, by law, had been cast upon the grantor as Zemindar. It has no relation to the *chowkidari chakran* lands.

The rule that a counterpart is primary evidence as against the parties executing it and secondary evidence as against the parties who did not execute it, has no application to the case where neither the lease nor the counterpart is complete in itself but each supplements the other.

Where any discrepancy is found to exist between a lease and its counterpart, the law presumes that the lease is correct, unless it be clear that the mistake is in that instrument (b).

In determining a question between contracting parties, recourse must first be had to the language of the contract itself, and (force, fraud and mistake apart) the true construction of the language of the contract is the touch-stone of legal right; it often happens, however, that disputes arise, not as to the

Lease.—(Continued).

terms of the contract but as to their application to unforeseen questions which arise incidentally or accidentally in the course of performance and which the contract does not answer in terms, yet which are within the sphere of the relation established thereby and cannot be decided as between strangers; in such cases, it is necessary to consider by what general law the parties intended that the transaction should be governed or, rather to what general law it is just to presume that they have submitted themselves in the matter (c).

The word 'Bazeaft' means resumption proceedings as understood under the Regulations and has nothing whatsoever to do with resumption proceedings as contemplated by Act VI of 1870 (B.C) (d). **Baidya Nath Dutt v. Kaminikant Gupta**, 6 C.L.J. 572.

MOOKERJEE and HOLMWOD, JJ.

References :—(a) 1 C.L.J. 303=9 C.W.N. 571, R. (b) 2 C.P.D. 88, R. (c) 6 B. and S. 100 (130, 133), *relied on*. 31 I.A. 1 (9)=27 M. 131=8 C.W.N. 186=6 Bom. L.R. 7, R. (d) Appeal from original decree No. 378 of 1897 (unreported), *relied on*.

(5) *Transfer of—Non-compliance by transferor with conditions of transfer—Failure of consideration.*

A lessee of a right to quarry for shells in certain zemindari villages transferred his lease to the defendant by means of a deed of transfer, which, among other things, provided that the transferor should obtain the consent of the owner of the quarry to the transfer, as it was one of the conditions of the original lease that no transfer should be made without the owner's consent, and that, on procuring his consent and delivering the shells already excavated to the transferee, the transferor should be paid Rs. 6,000 by the transferee. Soon after the transfer, disputes arose, and the transferor refused to register the deed, although registration was obtained notwithstanding (transferor's) plaintiff's opposition. The transferor also refused to obtain the consent of the owner to the transfer. But possession of the quarry and shells was given to the transferee in pursuance of the deed. The defendant also paid to the owner the arrears of rent accrued due before the transfer. But as subsequent arrears were not paid, the owner cancelled the lease according to a provision in the original lease-deed, and re-granted it to the defendant.

c.—(Concluded).

Held, in a suit by the transferor against the transferee for the recovery of the Rs. 6,000 agreed to be paid under the deed of transfer, (1) that, as the Rs. 6,000 was the price agreed to be paid for the transfer of the *whole* of the remaining term of the transferor's lease, and that, as the enjoyment of the transferee was cut off in the middle by the owner's cancelling the lease, and that, as the transferor was in a great measure responsible for such cancellation, the plaintiff was not entitled to any share of Rs. 6,000 (a); (2) that the defendant was not entitled to a refund of the amount he paid for arrears of rent, due before the date of the transfer, as the defendant was not liable to make this payment under his deed of transfer. **Pitti Theagaraja Chetti v. Ammoyi Ammal**, 2 M.L.T. 308.

SUBRAHMANY AIYER and BENSON, JJ.

Reference :—(a) 31 I.A. 107, F.

(6) Liability of lessee to pay new cess—See ACT II OF 1877 (CESS, BENGAL), No. 1, 6 C.L.J. 212.

(7) Forfeiture of—Suit for ejectment—See LIMITATION ACT, No. 108, 11 C.W.N. 661.

(8) Notice to quit when to be given—Presumption as to monthly tenancy—See TRANSFER OF PROPERTY ACT, No. 76, 16 M.L.J. 533 = 30 M. 109.

(9) Lessee of joint property—Liability for costs of partition suit—See PARTITION, No. 4, 5 C.L.J. 642.

(10) Lambardar's power to grant long lease of co-parcenary land—See LAMBARDAR and CO-SHARER, No. 2, A.W.N. (1907), 165.

(11) Suit for recovery of possession by lessor against third party, when maintainable—See LIS PENDENS, No. 1, 11 C.W.N. 828.

(12) Possession derived from lessee not necessarily adverse as against lessor—See ADVERSE POSSESSION, No. 4, A.W.N. (1907), 185.

(13) Lease—Subsequent sale to same person—Sale taking effect after expiry of lease—Merger—See LIMITATION ACT, No. 48, 3 N.L.R. 142.

(14) Kabuliya executed on behalf of Municipality—Mode of execution—See ACT III OF 1884 (MUNICIPAL ACT, BENGAL), No. 1, 12 C.W. N. 50.

(15) Right of perpetual lessee to redeem—See MORTGAGE (REDEMPTION), No. 16, A.W.N. (1907), 227.

Legacy.

Person paying and person receiving legacy are the same—Limitation does not apply—See LIMITATION, No. 4, 9 Bom. L.R. 287.

Legal Practitioners.

Suit for damages against, requisites of—Limitation—See LIMITATION ACT, No. 74, 10 O.C. 95.

Legal Practitioners Act.

See ACT XVIII OF 1879.

Letters Patent (Calcutta).

(1) *Cl. 12*—Rules and orders of the High Court—Rules 515-A and 515-B—Grant of leave under cl. 12 of the Charter by Registrar or Master, *if ultra vires*.

The Court's obiter.—Rule 515-A, so far as it authorises the granting of leave under cl. 12 of the Charter by the Master and Registrar, is *ultra vires*. **Brij Cocmaree v. Alma Chand**, 11 C.W.N. 663.

WOODROFFE, J.

(2) *Cls. 12, 15*—High Court, power to make rules—Power to grant leave under cl. 12—Rule delegating such power to Registrar *ultra vires*.

An order granting leave to sue under cl. 12 of the Letters Patent has been uniformly regarded as a judicial act, and the order has been treated as a judgment appealable under cl. 15 of the Letters Patent (a).

Rule 515 A framed by the High Court, in so far as it authorises the Registrar or Master to grant leave under cl. 12 of the Letters Patent, is *ultra vires*.

Leave of the Court should be obtained before the institution of the suit. (b) **Lalteswar Sing v. Rameswar Sing**, 5 C.L.J. 405 = 11 C.W.N. 649 = 34 C. 619 = 2 M.L.T. 406.

MACLEAN, C.J. HARRINGTON, GEIDT, MOOKERJEE, and CHITTY, JJ.

References : (a) 13 B. L.R. 91; 3 M. H. C. R. 384; 8 M.H.C.R. 21; 18 M. 236 and 15 B. 93. F. (b) (1866) 1 Ind. Jur. N.S. 218, F.

Letters Patent (Madras).

(i) *S. 15*—Order as to costs by a single Judge of the High Court, whether "judgment"—Appeal to the Division Bench.

An order made in the course of execution proceedings, relating only to costs, by a single Judge of the High Court, is not a "judgment" within the meaning of S. 15 of the Letters Patent, so as to give a right of appeal to the Division Bench of the High Court. **Saravana**

Letters Patent (Madras).—(Continued).

Mudaliar v. Rajagopala Chetty, 17 M.L.J. 569 (F. B.)

BENSON, BASHYAM AIYANGAR and MOORE, JJ.

References:—24 B. 358, 26 M. 437, 24 M. 511, L.R. 1903 A.C. 126, 8 Cl. and Fin. 264, L.R. 5 A.C. 582, R.

- (1) *Art. 12—Discretion to be exercised in granting leave to sue—Convenience—Non-resident foreigners.*

Having regard to the wording of Art. 12, it is clear that the fact that the cause of action arises in fact within the local limits of the ordinary original civil jurisdiction of the High Court is not conclusive, and that, notwithstanding that the cause of action arises in part within the local limits, the Court may decline to give leave to sue.

The question of convenience should not be excluded from consideration in dealing with applications under Art. 12 (a). Although the jurisdiction conferred by Art. 12 extends to suits against non-resident foreigners (b) the jurisdiction should be exercised with caution (c). **Seshagiri Row v. Askur Jung**, 17 M.L.J. 304=30 M. 438.

WHITE, C.J., and MILLER, J.

References:—(a) (1906) 1 K.B. 141 and 20 Q.B.D. 152, R; (b) 29 M. 239, R; (c) 21 Ch. D. 243, F.

- (2) *Cl. 15.—Refusal to issue commission for examining witnesses—Appeal.*

Where witnesses reside outside the jurisdiction of the Court and at a distance of more than 200 miles from the Court, and are not, therefore, compellable to attend in person, their evidence can be adduced, if at all, only by taking out a commission, and an order refusing to issue a commission is, therefore, one which affects the party's right to produce evidence relevant to the issues in the suit, and is a "judgment" within the meaning of S. 15 of the Letters Patent, and is appealable as such. The fact that the Judge has to exercise his discretion in regard to the issue of a commission does not affect the appealability of the order, though it will be a matter for consideration in dealing with the merits of the order appealed against. **Maruthamuthu Pillai v. Krishnamachariar**, 30 M. 143.

SUBAHMANIA IYER and MILLER, JJ.

Letters Patent (N. W. P. High Court).

- (1) *Ss. 7 & 8—Powers of enrolment of advocates—Suspension—Rule 197 of the rules of*

Letters Patent (N. W. P. High Court).—(Concluded).

Court—Suspension without trial—Disciplinary authority of High Court—Counsel guilty of contempt.

By Ss. 7 and 8 of the Letters Patent, the Allahabad High Court is authorised and empowered to approve, admit and enrol as many advocates as it thinks fit and to suspend any advocate on reasonable ground. A barrister of England or Ireland may be admitted under rules 180 and 181 of the Rules of High Court as an advocate and when he is so admitted he becomes subject to the disciplinary jurisdiction of the Court.

Rule 197 of the rules of Court provides for cases in which the Chief Justice and Judges may for good cause, and without charge or trial, suspend or remove from the rolls of the Court any advocate of the Court. An advocate may therefore be tried by three Judges under rule 2.

The intention of the Crown was to give a wide discretion to the High Courts in India in regard to the exercise of their disciplinary authority. The rules of Court indicate the precaution taken by the Court itself to secure that the powers shall not be exercised capriciously or oppressively, and there is no reason to apprehend that the just independence of the Bar runs any risk of being impaired by its exercise. On the other hand, it is essential to the proper administration of justice that unwarrantable attacks should not be made with impunity upon the Judges in their public capacity.

Where a Counsel is guilty of contempt in the attempt to vindicate his professional conduct in a publication of which he is an editor, *held* that the libel constitutes 'reasonable cause' for which he may be suspended from practice (a). *In the matter of S. B. Sarbadhichary*, 4 A.L.J. 34=9 Bom. L.R. 9 (P.C.)=17 M.L.J. 74=11 C.W.N. 273=5 C.L.J. 130=2 M.L.T. 1=5 Cr. L.J. 152=29 A. 95.

LORD DAVEY, LORD ROBERTSON, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

References:—(a) *In re Wallace* L. R., I.P.C. 283, D.

License.

- (1) *Landlord and tenant—Adverse possession of site for over 12 years—Revocation of license—House of a permanent character—See EASEMENTS ACT, No. 5, 3 A.L.J. 760.*

Limitation.

- (1) *Administration suit—Persons whose claims are not barred can bring the suit.*

In England, actions for the administration of the estates of deceased persons can only be instituted by persons, whose claims to recover are not barred by any statute of limitation. The same principle applies in India. **Nandlal Chunnilal v. Gopilal Manilal**, 9 Bom. L.R. 316.

JENKINS C.J., and KHAREGHAT, J.

- (2) *Suit by minor to contest alienation of his property by self-constituted guardian—weight of medical evidence as to age—Interpretation of bar of Limitation where minor's property is concerned.*

F., within three years after attaining majority, sued for declaring that an additional sum of Rs. 1,225 added to the mortgage money of the deed, dated 31st January, 1898, executed by his brother, defendant No. 1, while acting as guardian of F., a minor at the time, in favour of C, shall not affect his half share in the ancestral holding. The first Court decreed the claim. The Appellate Court dismissed the suit as barred by limitation.

Held, that bar of limitation must always be interpreted strictly, especially so when minor's property is concerned.

Held, also, that when the age of a minor is in dispute, preference is to be given to the weight of medical evidence in the absence of any clear proof to the contrary. **Fatah Mohammad v. Foja and Chandl**, 6 P.W.R. 1907 = 29 P.L.R. 1907.

ROBERTSON, J.

- (3) *Suit to establish right to homestead lands—Right by purchase—Lands included within a particular howla—Denial by defendant—Limitation—Time runs, if from date of sale or from delivery of symbolical possession—.*

When a plaintiff obtains a decree and, in execution of it brings a certain immoveable property to sale, purchases it himself and obtains symbolical possession of the property, time begins to run, not from the date of the sale at which the plaintiff purchased the property, but from the time when the plaintiff obtained symbolical possession of the same, and a suit brought by the plaintiff within 12 years from such date for establishment of his right by purchase is not barred by limitation. **Dwarka Nath Baksh v. Mukundu Lal Chowdhury**, 5. C.L.J. 55.

RAMPINI and GEIDT, JJ.

Limitation. (Continued).

- (4) *Express trust—Statute of limitation does not apply in case of such trust—Where the person paying and the person receiving the legacy are the same, limitation does not apply.*

Where the duty of persons is to receive property, and to hold it for another, and to keep it until it is called for, they cannot discharge themselves from that trust by appealing to lapse of time (a).

Where the person liable for the payment of a legacy, and the person entitled to receive it, are the same, no question of limitation arises (b). **Narandas Ramji v. Narandas Ramji**, 9 Bom. L.R. 287 = 31 B. 418.

RUSSELL, J.

References:—(a) 2 Q.B. 393, F; 18 Ch. D. 254, (1870) L.R. 5 Ch. 233, 21 W.R. 137, R. (b) L.R. 2 Eq. 256, F; 8 B. 241, 10 B. 468, 12 B. 621, 4 C. 360, R.

- (5) *Adverse possession—Limited interest—Right of permanent tenant—Registration Act, Ss. 17 and 49—Unregistered lease, admissibility of, to prove adverse possession.*

A person can acquire, by adverse possession, a limited interest such as that of a permanent lessee (a).

Where adverse possession of certain lands by the plaintiff, as a permanent tenant, for the statutory period, is the transaction to be proved in a suit, an unregistered permanent lease cannot be received as evidence of such transaction (b). **Subbaya v. Madduleiah**, 17 M.L.J. 469.

BENSON and WALLIS, JJ.

References:—(a) 27 B. 515, R. (b) 27 B. 515, 25 W.R. 211, Diss. 2 R.R. 642, R.

- (6) *Decree ex parte—Civil Procedure Code, S. 108—Decree set aside as against one of several joint judgment-debtors—Decree passed subsequently against exempted party—Execution of decree—Limitation.*

A decree for sale on a mortgage was passed against several defendants jointly on the 25th of August, 1900 and made absolute on the 21st December, 1901. As against one defendant, however, the decree was *ex parte* and it was set aside as against her, on appeal, on the 11th March, 1902. Subsequently, a decree was passed on the merits against this defendant, and her appeal was dismissed by the High Court on the 16th November, 1904. As against this defendant the decree was made absolute on the 27th of November, 1905.

Limitation.—(Continued).

Held, that the orders of the 25th August, 1900 and the 16th November, 1904, between them, operated as one decree for the sale of the mortgaged property; that the joint effect of the orders of the 21st December, 1901 and the 27th November, 1905 was to make absolute this decree, and that an application for execution made on the 21st December, 1905, was not barred by limitation. **Gauri Sahai v. Ashfaq Husain** A.W.N. (1907), 204 = 4 A.L.J. 552 = 29 A. 623.

RICHARDS and GRIFFIN, JJ.

References :—24 A. 333, 27 A. 501, A.W.N. (1902), 184 R.

(7) Order under S. 199, Agra Tenancy Act, to file suit—Ordinary period of limitation suspended—Governed by the special period provided by the section—See ACT II OF 1901 (AGRA TENANCY), No. 16, 4 A.L.J. 713.

(8)—as to a claim for set-off in a suit for contribution—See CONTRIBUTION, No. 3, 12 C.W.N. 60.

(9)—for execution of decree for mesne profits commences from the time when it is finally assessed and awarded—See MESNE PROFITS, No. 2, 6 C.L.J. 462.

(10) Effect of entry in record-of-rights—Suit for possession—Limitation—See RECORD OF RIGHTS, No. 1, 6 C.L.J. 670.

(11) Rights of pre-emption accrued before passing of Punjab Act II of 1905—Limitation—See ACT II OF 1905 (PRE-EMPTION, PUNJAB), No. 3, 191 P.R. 1907.

(12) Joining of persons as plaintiffs under S. 27 of the Civ. Pro. Code—Limitation for the suit—See CIV. PRO. CODE, No. 37, 149 P. R. 1907.

(13) *Guardian *ad litem* of defendant respondent, not made party to appeal until after the period of limitation for filing appeal—whether appeal barred—See GUARDIAN AD LITEM No. 3, A.W.N. (1907), 290.

(14) Erroneous finding of Court as to bar by, when precludes revision—See ACT XIII OF 1884 (PUNJAB COURTS), No. 7, 118 P. R. 1906 = 79 P.L.R. 1907.

(15) Execution of decree—Agreement to pay decree debt in instalments—Formal order not drawn up under S. 210, Civ. Pro. Code, effect of, on limitation as to execution of decree—See CIV. PRO. CODE, No. 92, 5 C.L.J. 25.

(16) Withdrawal of appeal—Limitation when begins to run for execution of original decree—

Limitation.—(Concluded).

See EXECUTION OF DECREE, No. 3, 1 M.L.T. 233 = 16 M.L.J. 393 = 30 M. 1.

(17) Partition suit—Step in the action and not step in aid of execution—See PARTITION, No. 2, 2 M.L.T. 265.

(18) Effect of application to bring decree into accordance with judgment—See CIV. PRO. CODE, No. 90, A.W.N. (1907), 169.

(19) Suit for breach of contract for tolls—S. 150, Local Boards Act—See CONTRACT ACT, No. 35, 2 M.L.T. 194.

(20)—for execution of decree passed on appeal—Civ. Pro. Code, S. 230—See EXECUTION OF DECREE, No. 1, 34 C. 874.

(21) Possession by widow of pre-deceased son, whether adverse—See CUSTOMS (PUNJAB), No. 35, 102 P.R. 1907.

(22) Arrears of Tiruppuvaram, recovery of—Personal remedy—Period of limitation whether three or twelve years—hitherto not decided—See CIV. PRO. CODE (TRAVANCORE), No. 1, 22 T.L.R. 1.

(23) Paravar caste—Mixed custom of inheritance—Personal law of inheritance—Custom, evidence as to—Plaintiff's possession not within 12 years before suit—Claim barred—See HINDU LAW (INHERITANCE), No. 4-a, 22 T.L.R. 13.

Limitation Act.

(1) Presentation of memoranda of second appeals, &c.,—See HIGH COURT RULES (BOMBAY), No. 2, 9 Bom. L.R. 1138. (F.B.).

(2) S. 4—Presentation of insufficiently stamped plaint—Making up of stamp duty, subsequent to the period of limitation for the suit—Validity of the plaint—Court Fees Act, S. 28—Civ. Pro. Code, Ss. 48 and 54.

Held, (1) that the word "presented" in the Explan. to S. 4 of the Limitation Act should be interpreted in accordance with the provisions of the Civ. Pro. Code, S. 48; (2) that the Court Fees Act and the Civ. Pro. Code should be read together in regard to the presentation of plaints and the making up of stamp duty, but not with the provisions of the Limitation Act, which is not an Act *in pari materia*; (3) that, under S. 54 of the Civ. Pro. Code and S. 28 of the Court Fees Act, deficiency in stamps can be made good by order of Court, irrespective of the question, whether, on the date of filing them, the limitation for the suit has expired or not; (4) that, under S. 28 of

Limitation Act.—(Continued).

the Court Fees Act, on the making up of the deficiency of stamp duty by order of Court, the plaint and all proceedings relative thereto are validated from the date of original presentation, even though the limitation for the suit had since expired and (5) that, once the stamps are taken by the Court, the order cannot be subsequently set aside, nor the validation of the original presentation annulled. **Saif Ali Khan v. Fazil Mehdi Khan**, 123 P.R. 1907=82 P.W.R. 1907.

CHATTERJEE and JOHNSTONE, JJ.

References:—130 P.R. 1890, 74 P.R. 1903, 3 P.R. 1893, 156 P.R. 1898, *Appr*; 27 A. 411, 23 A. 423, *Diss*; 12 A. 123 (F.B.), 15 A. 65 (F.B.), 24 A. 218, 19 C. 780, 37 C. 814, 31 C. 75, 15 M. 29, 15 M. 78, 22 M. 494, 27 B. 330, 11 A. 241 (P.C.), *R*.

(3) S. 4—"Plaint"—Meaning of—See COURT FEES ACT (VII OF 1870), No. 2, 4 A.L.J. 636.

(4) S. 4, bearing of, on defences and pleas—See CUSTOM (PUNJAB), No. 48, 3. P.W.R. 1907.

(5) Ss. 4 and 14—See FORMA PAUPERIS, No. 2, 9 Bom. L.R. 204.

(6) S. 4, arts. 132 and 147—*Special Bench—Jurisdiction—Full Bench decision other than that referred for consideration, if binding—Limitation, plea of, not set out in memorandum of appeal from appellate decree—Appellate Court, if bound to entertain plea—Discretion—Civil Procedure Code (Act XIV of 1882), Ss. 542 and 584—Mortgage by conditional sale—Suit for foreclosure in Sambalpur District—Limitation.*

A Special Bench, to which a question involving the re-consideration of a decision of a Full Bench was referred, cannot consider the correctness or otherwise of a decision of a Full Bench on another question not referred, and which was raised in the course of the argument before the Special Bench.

In the present case, which came from Sambalpur District, *held*, that the Full Bench ruling in *Girwar Singh v. Thakur Narain Singh* (a) applied, and that the suit, which was for the foreclosure of a mortgage by conditional sale, was governed by Art. 132 of Sch. II of the Limitation Act, and not by Art. 147, and having been instituted more than twelve years after the due date, was barred by limitation.

The Special Bench gave effect to the plea of limitation, although it was never raised in

Limitation Act.—(Continued).

either of the Courts below, nor even in the memorandum of appeal to the High Court, and was taken for the first time before the Special Bench, the majority being of opinion that the point arose on the face of the plaint, and there was no question of fact to be enquired into to enable the Court to dispose of it.

Held, by the majority, that the provisions of S. 4 of the Limitation Act are mandatory and ought to be given effect to, even though the point of limitation is taken at a late stage of the case in the Court of second appeal.

Per Woodroffe, J.—S. 4 of the Limitation Act is controlled by the provisions of S. 542 of the Civil Procedure Code. The illustrations to S. 4 cannot affect the precise provisions of the other statutes. It is therefore in the discretion of the Appellate Court to allow or disallow a plea of limitation not set out in the grounds of appeal.

Per Mookerjee, J.—S. 542 of the Civil Procedure Code does not control and is not controlled by the provisions of S. 4 of the Limitation Act. An appellant is not entitled, without the leave of the Court, to urge or be heard in support of a ground of limitation not set out in his memorandum of appeal. When the bar of limitation is patent on the face of the proceedings, and does not need to be developed by a fresh investigation into evidence, the Appellate Court may grant such leave. In such circumstances, it may, also, of its own motion, consider such a ground and rest its decision thereon, provided the opposite party has been given an opportunity to be heard on the point.

The Judicial Committee did not lay down (b) that, under S. 584, Civil Procedure Code, a Court of second appeal cannot deal with a question, which has not been specified in the memorandum of appeal.

Held—By Rampini, O.J., and Sharfuddin, J. (before reference)—that a second appeal lay to the Court of the Judicial Commissioner of the Central Provinces, from the appellate decision of the District Judge of Sambalpur before Act VII of 1905 was passed, and now lies to the Calcutta High Court (c). **Bala Ram v. Mangta Das**, 11 C.W.N. 959 (F.B.)=6 C.L.J. 237=34 C. 941.

RAMPINI, C.J., BRETT, MITRA, WOODROFFE, MOOKERJEE, CASPERSZ and SHARFUD-DIN, JJ.

References—(a) 14 C. 730, *Appl* (b) 20 C 93 *R.* (c) 11 C. W.N. 956, *R*.

Limitation Act. — (Continued).

- (7) *S. 5—Appeal presented beyond time—Sufficient cause for not presenting appeal in time—Forum of appeal doubtful, Counsel, advice given by, in case where—Due care and attention, advice given by Counsel after—Trust, when plaintiffs claimed to recover their share on payment of the amount due to defendant—History of settlement with taluqdars of Oudh.*

A decree was passed in favour of the plaintiffs-respondents from the Court of the Subordinate Judge. The defendant-appellant presented his appeal to the District Judge well within time. The District Judge, prior to the date fixed for the hearing of the appeal, held that the appeal lay to his Court. On the date fixed for the hearing of the appeal, the respondents again objected that the appeal should not have been filed in his Court. After hearing arguments on this question the District Judge adhered to his previous decision, but on the merits he decided in favour of the appellant. The respondents then appealed to the Court of the Judicial Commissioner, which held that the defendant's appeal against the decree of the Subordinate Judge should have been presented to this Court and not to the District Judge. The appeal was allowed, the decree of the District Judge set aside, and the memorandum of appeal directed to be returned to the defendant to be presented to the proper Court. The memorandum of appeal was returned to the appellant on the same day that the order was passed, and it was presented by him the same day to the Court of the Judicial Commissioner.

Held, that as the appellant had acted *bona fide* on the advice of his Counsel, who had advised him to lodge the appeal before the District Judge, and as the question of forum of the appeal was not free from difficulty, and Counsel for the appellant had acted with due care and attention, the appellant had made out sufficient cause for not presenting this appeal within time (a).

The village in suit was settled with the defendant who claimed a lien on it for revenue paid in respect of it.

Held, on the evidence that no case of trust had been made out. The history of the settlement with taluqdars of Oudh as mortgagees reviewed. (b) **Nawab Mirza Mahammad Baker Ali Khan v. Muhammad Baker**, 10 O.C. 291.

CHAMIER, J.C. and SANDERS, A.J.C.

Limitation Act. — (Continued).

References :—(a) 28 A. 414, R. (b) 26 C. 879, R.

- (8) *S. 5—Delay—Excuse of delay—Discretion of Court—Interference in appeal.*

On the 25th February, 1899, an order was passed by a Subordinate Judge in execution-proceedings. Instead of appealing from that order, the party aggrieved filed a suit on the 24th February, 1900, in which it was decided, on the 30th September, 1903, by the District Judge in first appeal, that the suit was barred by S. 244 of the Civ. Pro. Code. It was not till the 4th January, 1904, that an appeal from the order of 25th February, 1899, was preferred. The district Judge decided that there was no sufficient reason for not presenting the appeal in time and dismissed the appeal.

Held, that, having regard to the delay, which occurred in presenting this appeal between the 30th September, 1903, and the 4th January 1904, it was not open to the appellant to contend that the District Court exercised its discretion in a capricious or arbitrary manner. **Bhimrao Ramrao v. Ayyappa Yellappa**, 8 Bom. L.R. 858 = 31 B. 33.

ASTON and HEATON, JJ.

References :—17 B. 49, 23 B. 513, 6 B. 304 and 7 Bom. L.R. 965, R.

- (9) *S. 5—'Sufficient cause'—Appeal preferred to wrong Court—Mistake—Due diligence—Negligence—Extension of time—Ex parte order—Respondent, if binding on.*

Where the appellants, being themselves pleaders and well acquainted with the facts of the case, preferred an appeal from an order in a suit valued at over Rs. 5,000, to the District Judge, instead of to the High Court (the proper tribunal under Act XII of 1887), they had not acted in good faith, but with gross negligence and carelessness, and they were not entitled to an extension of time under S. 5 of the Limitation Act.

The words 'sufficient cause' should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of *bona fides*, is imputable to the appellant (a).

The fact that the appeal was filed a month after the District Judge had returned the memorandum of appeal, for presentation to the proper Court, was an additional proof of want of diligence in the appellants.

Limitation Act.—(Continued).

The order of the Court for admission of an appeal under S. 5, before notice is given to the respondent, is in no way binding upon the respondent when he appears, and he may question the validity of such order. **Sarat Chandra Bose v. Saraswati Debi**, 5 C.L.J. 380=34 C. 216.

MOOREJEE and HOLMWOOD, JJ.

References:—(a) 13 M. 269, *appr.* 13 C. 266, 21 B. 552, 8 C.W.N. 233, 3 C.L.J. 545, 33 C. 1323 (1837), 23 C. 526, 5 A. 591, 10 A. 591, 10 A. 524, 10 A. 587, 28 B. 235, 3 O.C. 265, 12 A. 461, 13 C. 62, 2 O.C. 133, 3 O.C. 13, 81 P.R. 1886, 184 P.R. 1889, 1 K.B. 1, 28 A. 414, 30 C. 311 (note), 1 A. 34, 9 A. 11, 13 W.R. 245. R.

(10) S. 5—*Different copies of the same judgment obtained by the appellant—Appeal filed on one of these copies, whether barred by limitation or not—“Time requisite for obtaining copy of a judgment,” meaning of—Sufficient cause for not presenting the appeal within time—Uniform practice of the Court, effect of being misled by.*

The appellant made three applications from time to time for a copy of the same judgment and obtained three such copies. Calculating the period of limitation by including the time requisite for obtaining a copy of the judgment on the copies obtained under the first two applications, the appeal was time-barred. The appellant, however, presented his appeal, as founded upon the copy of the judgment obtained upon the third application, in which case the appeal was within the period of limitation. The respondent contended that the appellant, having already obtained copies of judgment upon the first two applications, could not claim the days spent in obtaining the third copy as “time requisite for obtaining a copy of judgment,” and the appeal was therefore barred by limitation.

Held, that, although the appellant was not legally entitled to claim deduction of such time, yet, he had made out a sufficient cause for not presenting the appeal within the period of limitation, inasmuch as the uniform practice of the Court, in determining the question whether an appeal was presented within limitation, had been to have regard solely to the endorsements made upon the copy of the judgment upon which the appeal was lodged, and such practice must have misled the appellant. **Shambhu Ratan v. Shoo Balak**, 10 O.C. 201.

GRIFFIN and CHAMBER, J.CS.

Limitation Act.—(Continued).

(11) S. 5—*Suit for ejectment against a co-sharer—Appeal presented to wrong Court—Limitation—See ACT II OF 1901 (AGRA TENANCY), No. 11, 4 A.L.J. 1.*

(12) S. 5, if applies to proceedings under the Registration Act—*See REGISTRATION ACT (III OF 1877), No. 11, 5 C.L.J. 189.*

(13) Ss. 5, and 12—*Appeal filed out of time—Bona fide mistake of pleader in calculation—Application for admission granted ex parte by a division Court—Application for discharge of order by respondent—Delay—Costs incurred by Appellant.*

Where an application for the admission of an appeal, which was filed out of time by two days, was heard *ex parte* before a Division Bench and admitted.

Held, that, though the order was not conclusive on the respondents, and they are entitled to object to the admission of the appeal at a later stage, the order of the Division Bench admitting the appeal should not be discharged when no facts which were not before that Bench are urged on behalf of the respondents.

Held, further, that, on the facts of the present case, the order admitting the appeal should not be discharged *inter alia*, because the respondents' application was made after the records had been printed and costs incurred by the appellants, although the respondents appeared to have become aware of the filing of the appeal out of time shortly after it was filed.

Per Woodroffe, J.—Each case must be decided on its own facts. In this case, besides the delay on the part of the respondents in bringing their objections before the Court, there was a *bona fide* mistake of calculation on the part of the appellants' pleader which led to the delay in filing the appeal. **Bishendut Tewari v. Nandan Pershad Dubay**, 12 C.W.N. 25.

WOODROFFE and COXE, JJ.

(14) Ss. 5 and 14—*Limitation—Appeal—Delay in filing appeal due to appellant bona fide accepting erroneous legal advice.*

Where a client *bona fide* accepts the advice of counsel as to the proper procedure to adopt in the course of litigation, and, misled by that advice, fails to file an appeal within time, he is entitled to the benefit of section 5 of the Limitation Act. **Anjora Kunwar v. Babu**

Limitation Act.—(Continued).

A.W.N. (1907), 219=4 A.L.J. 515=29 A. 688.

AIKMAN, J.

References:—5 A. 591, 19 A. 348, 28 A. 414, F. 1907, 1 K.B. 1, R.

(15) Ss. 5, and 20.—Presentation of plaint on opening day after vacation.—Part-payment of principal and interest.

A plaint, the period of limitation for filing which expires while the Court is closed for vacation, presented on the opening day after the vacation, is to be treated as presented in time, although the Prothonotary's office is working in the vacation for urgent work.

S. 20 of the Limitation Act requires that interest must be paid as interest *i. e.*, it must be distinctly stated at the time of payment that it is paid on account of interest, or else there must be evidence from which the payment as interest may be distinctly inferred, and if so, the mere proof of payment is sufficient. Principal must always be paid as principal, but the fact of the payment must appear in the handwriting of the person making the same, *i. e.*, of the debtor or his duly authorised agent; it must appear that the payment is a part-payment of principal, and this fact cannot be proved *aliunde* by the creditor. The fact, however, of its being a part-payment of principal, need not be stated in so many words; it may be inferred from the writing itself. **Ranchordas Tribhowandas v. Prestonji Jehangir**, 9 Bom. L.R. 1829.

RUSSELL, J.

(16) S. 7.—Execution proceedings—Death of decree-holder pending stay of execution—Right of minor to revive proceedings—Limitation.

Where a mortgaged decree-holder applied for sale of the mortgaged properties, but, on objection, the proceedings were stayed, and before the stay order was removed, the decree-holder died leaving a minor son, and shortly afterwards, the stay order was removed and the application for sale also was struck off,

held—that the minor heir of the decree-holder was entitled to the protection of S. 7 of the Limitation Act, and an application for sale made on his behalf more than three years after was not barred by limitation. **Sheik Abdul Latif v. Rajani Mohun Roy**, 11 C.W.N. 831.

MITRA and CASPERSZ, JJ.

Limitation Act.—(Continued).

(17) S. 7.—Right of reversioner born after alienation to contest its validity.

A reversioner, born after an alienation has been made, is, under certain conditions, competent to contest its validity (a); but he can only do so, if the period of limitation had not expired before the date of his birth, and his suit is brought within the period prescribed by law. He cannot, if born after the cause of action has already accrued and time begun to run, claim an extension of time under S. 7. **Umra v. Ghulam**, 22 P.R. 1907=89 P.W.R. 1907.

RATTIGAN and LAL CHAND, JJ.

References:—29 B. 68; 24 W.R. 7, R.; (a) 55 P.R. 1903 (F.B.), R.

(18) Ss. 7 and 8 and Art. 178—minority of decree-holders at the date of application for an order absolute, effect of—step in aid of execution—fresh start.

A decree for sale was passed on the footing of a mortgage in 1886. In 1889, after the death of the original decree-holder, his minor sons made an application for an order absolute. More than three years after 1889, they made an application for execution, but when two had attained majority and one of them was still a minor; *held*, that the decree was not barred by limitation. The application of 1889 was a step in aid of execution and gave a new start to the period of limitation. The sons, being minors at that date, could claim the benefit of S. 7 of the Limitation Act (a). **Sri Ram v. Het Ram**, 4 A.L.J. 145=A.W.N. (1907), 45=29 A. 279.

KNOX and RICHARDS, JJ.

References:—(a) 22 A. 193, F. 2 A.L.J. 453, D; 27 A. 625, R.

(19) Ss. 7, and 9—Alienation by father—Limitation under Punjab Limitation Act—Suit by after born son—Applicability of S. 7—See ACT I OF 1900 (PUNJAB LIMITATION), No. 1, 108 P.R. 1907.

(20) Ss. 7 and 9 and Art. 120—Starting point of limitation of the usual declaratory suit by a childless proprietor's reversioner born subsequent to the alienation—Custom.

D, born in 1888, filed a declaratory suit on 20th January, 1905, to contest a sale by B, a childless proprietor, dated 1st October, 1878.

Held, that the status of a reversioner, born subsequent to the alienation, is similar to that of an after-born son as decided in 155 P. R. 1903 and his right of suit is dependent on the

Limitation Act.—(Continued).

acts or omissions of his immediate ancestor or collateral, and that he does not acquire, on his birth, a fresh right to sue, irrespective of the time, which may have elapsed since the alienation.

Held, also, that the right to sue for the declaratory decree is vested in the whole body of reversioners, in existence at the time of alienation, jointly and severally, and begins to run simultaneously against them all and no subsequent disability stops it.

* *Held*, further, on the above principles, that the right to sue for the declaratory decree had become barred by time in 1884, and was not revived on the birth of D in 1888. **Mohan Singh v. Dewa Singh**, 21 P.W.R. 1907.

CHITTY and LAL CHAND, JJ.

References:—22 A. 33, *Distd.*, and *disapproved*; 155 P.R. 1903, 68 P.R. 1903, 24 P.R. 1906 and 76 P.R. 1906, *l'.* and *appr.*

(21) S. 8, applicability of—Discharge by one member of a joint Hindu family—Effect—See *TOLTS*, No. 1, 6 C.L.J. 383.

(21-a) S. 8—See No. 18, *supra*.

(21-b) S. 9—See Nos. 19 and 20, *supra*.

(22) S. 10—Trust for a specific purpose—Express trust—Resulting trust—*Indian Trusts Act (II of 1882)*, Ss. 81, and 83.

S. 10 of the Limitation Act, 1877, does not apply to a resulting trust in favour of the settler, which arises by the operation of Ss. 81 and 83 of the Indian Trusts Act, 1882, on the ground that the object of the original trust is uncertain or undiscoverable.

Whether the resulting trust flows from the invalidity of the declared trust or from the impossibility of ascertaining the declared trust, it is equally a substituted trust, that is, a trust which is created by the law *forte de mieux*, that is, as the best arrangement which the law regards as possible in difficult circumstances. This general rule is affected to this extent only, that where there is a trust covering the whole estate, and the bequests do not exhaust the whole estate, the trustees are express trustees of the residue for the heir of the testator. **Mathuradas Damodardas v. Yandrawandas Soonderji**, 8 Bom. L.R. 328=31 B. 222.

BATCHelor, J.

(23) Ss. 10 and 19, Arts. 64, 120—Suit to recover trust-property from trustee on failure of the object of trust—Statement of accounts

Limitation Act.—(Continued).

in defendant's books by plaintiff not signed by defendant or his agent—Acknowledgment—Account stated—Contract to pay debt barred by limitation—Contract Act, S. 25 (3).

S. 10 of the Limitation Act applies to express trusts alone and excludes implied trusts, and those resulting from operation of law. It does not apply to a suit to recover trust-money in the hands of the trustee, on failure of the objects of the trust, (a) for the use of the author of the trust and not for the purpose of the trust (b).

The bare striking of a balance comprising largely of barred debts in the defendant's account book in the plaintiff's handwriting which is not signed by the defendant or his *munim*, and which does not contain words acknowledging liability by defendant or stating account on his behalf, is neither an acknowledgment under S. 19 of the Limitation Act, nor an account stated under Art. 64, nor a promise under S. 25 (3) of the Contract Act (c).

The mere transfer of a barred item from another account into a mutual open current account, even with defendant's consent, places plaintiff in no better position than he would have been in, had he sued for the item individually on the credit entry (d).

A promise to pay is an essential part of a contract falling under S. 25 (3) of the Contract Act. The contract must be an express one according to the authorities, i.e., not to be deduced by implication from a mere acknowledgment (e). **Gulzari Mal v. Kishan Chand**, 132 P.R. 1907.

CHATTERJI and JOHNSTONE, JJ.

References:—(a) 4 C. 455, 4 C. 897, 16 A. 257, 8 C. 788, *R*; (b) 20 B. 511, *R*; (c) 31 C. 1043, 122 P.R. 1889, *R*; (d) 22 B. 607, 17 M. 293, *R*; (e) 8 B. 194, 8 B. 405, 23 A. 502, *R*; 122 P.R. 1889, 102 P.R. 1905, *D*.

(24) S. 10 and Art. 143—Exchange of Temple land by a temple trustee for other land—Suit by a third person claiming under a paramount title—Failure of consideration—Final decree—S. 119, Transfer of Property Act.

In a suit instituted by a temple trustee, under S. 119 of the Transfer of Property Act, to recover back land exchanged by a former trustee for other land, of which the temple had since been deprived, owing to a decree in favour of a third party claiming under a paramount

Limitation Act.—(Continued).

title, it was held that the transfer was a transfer for a valuable consideration and was not a mere voluntary transfer, and S. 10 of the Limitation Act, was not applicable to the suit. Art. 143 of the Act barred the suit.

Where a person had been dispossessed by suit, it would be legally unreasonable to require him to sue for relief founded on such dispossession, before the date of the final decree under which he was dispossessed. The dispossession, in execution of the decree in the Court of first instance, was not final but subject to the result of an appeal, and the effect of filing the appeal was to re-open the question of his right to possession and make it once more *subjudice* pending the decision of the appeal.

Under S. 119 of the Transfer of Property Act, a plaintiff's cause of action does not arise before the date of the final decree in the suit, in which he was dispossessed (a) **Rajagopalan v. Tirupananthal Thambiran**, 17 M.L.J. 149 = 30 M. 316.

BENSON and WALLIS, JJ.

References:—(a) 19 C. 123, 26 B. 750 and 11 A. 47, *Expt and D.*

* (25) S. 12—*Time requisite for obtaining copies—purpose for which copies obtained—application by authorised agent or appellant.*

The words of S. 12 of the Limitation Act are general. The time requisite for obtaining copies of decree and judgment should be excluded from the computation of time. It is not necessary that the application for copy should be made by the appellant or by some duly authorised agent, nor is it necessary to show for what purpose the copies were obtained. **Ram Kishun Shastri v. Kashi Bai**, 4 A.L.J. 152 = A. W.N. (1907), 67 = 29 A. 264.

STANLEY, C.J., and BURKITT, J.

(26) S. 12, applicability of, to applications under S. 70 (b) of Punjab Courts Act—See ACT XVIII OF 1884 (PUNJAB COURTS), No. 8, 20 P.R. 1907.

(27) S. 12—Applicability of section in computing period mentioned in S. 70 (1) (b), proviso 1 of Act XVIII of 1884—See ACT XVIII OF 1884 (PUNJAB COURTS), No. 9, 114 P.R. 1907.

(27-a) S. 12—see No. 13, *supra*.

(27-b) S. 14—see Nos. 5 and 14, *supra*.

(28) S. 14, Art. 120—*Suit against son for recovery of Hindu father's judgment-debt—*

Limitation Act.—(Continued).

Exemption under S. 14 not alleged in plaint—S. 50, Civ. Pro. Code.

Art. 120 of the Act governs a suit based on the original cause of action against a Hindu son to recover a debt created by a decree against the father, and the suit must be brought within six years from the time of the accrual of the cause of the action (a).

Having regard to S. 50 of the Civ. Pro. Code., a plaintiff, who has not alleged in his plaint a ground of exemption from the bar of limitation under S. 14 of the Limitation Act, will not be allowed, on appeal to take advantage of such exemption (b). **Delhi Jagannadha Row Pantulu Garu v. Brundavanam Seshayya**, 17 M.L.J. 281.

WHITE, C.J., and MILLER, JJ.

References.—(a) 27 M. 243 (254) I; (b) 31 C. 195, I.

(29) S. 19—*Acknowledgment—Implied acknowledgment—Acknowledgment must refer to the liability and not any liability.*

An acknowledgment within the meaning of S. 19 of the Limitation Act, 1877, must distinctly and definitely relate to the liability in dispute. It need not be express; it may be left to implication. It must be a necessary implication from the words used that the person acknowledging was referring to and admitting the liability, not any liability. **Gopalrao Manohar Tambekar v. Harilal Subrai Sevak**, 9 Bom. L.R. 715.

CHANDAVARKAR and PRATT, JJ.

(30) S. 19—*Acknowledgment by a person who, when he made it, had no right to the property.*

Section 19 of the Act does not require that the person making an acknowledgment should have an interest in the property, in respect of which the acknowledgment was made, at the time when the acknowledgment was given. It is sufficient if, before the period of limitation expires, an acknowledgment of liability or right has been made in writing by the person, against whom the right is claimed. **Jugul Kishore v. Fakhr-ud-Din**, 3 A.L.J. 680 = A.W.N. (1906), 286 = 29 A. 90.

STANLEY, C.J., and RUSTOMJI, J.

Reference.—1 C.W.N. 569, R.

(31) S. 19—*Estoppel by acquiescence and conduct—Limitation—Mortgage—Extinguishment of right of redemption by lapse of time.*

Limitation Act.—(Continued).

—*Suit by mortgagees to be declared owner—Fresh contract of mortgage—Starting point of limitation—Acknowledgment of mortgage by adult mortgagee, when binding upon minor co-mortgagee—Power of Muhammadan guardian over the property of his ward—Agent—Muhammadan and Indian case law upon the subject.*

150 years ago, the original mortgage was effected for certain land in consideration of Rs. 1,000. About 1839 A.D., upon a dispute arising, a local ruler arranged that thenceforth $\frac{1}{4}$ of the land should remain under mortgage for Rs. 600.

In 1874, when the mortgagees were B, S and G (a minor, now plaintiff No. 1), B alone sued the then mortgagors for recovering possession of the land in the Court of the Settlement Officer on the allegation that he had been ousted in 1873 A.D. B compromised the suit, professing to act for the other co-mortgagees as well and filed a *Razinama*, which was also attested by S and acted upon by G for a number of years after he attained majority.

Afterwards, B died leaving a son (plaintiff No. 2) and S died sonless.

In 1902, plaintiffs 1 and 2 sued for a declaration that the mortgagors had, by lapse of time, lost all right to redeem.

The first Court dismissed the suit mainly on the ground that the compromise of 1874 amounted to an acknowledgment under S. 19 of Act XV of 1877. But the Divisional Court decreed the claim in full, on the ground that the *Razinama* was not binding on G.

On further appeal to the Chief Court, it was contended that (1) the compromise was a new contract and amounted to an acknowledgment under S. 19 of Act XV of 1877, and (2), consequently, time began to run from 1874.

Held, by the Full Bench, that there was a renewal of mortgage contract in 1874 and that the period of limitation must be reckoned from that date and that plaintiff was estopped by his conduct from pleading the contrary. **Ghulam Haidar Shah v. Ghulam Muhammad Khan**, 23 P.W.R. 1907 (F.B.)=43 P.L.R. 1907.

JOHNSTONE, RATTIGAN and CHITTY, JJ.

References:—45 P.R. 1869, 52 P.R. 1872, 144 P.R. 1883, 192 P.R. 1889, 58 P.R. 1891, 65 P.R. 1893, 1 A. 532, 3 A. 437, 8 A. 324, 6 B. 467, 11 C. 417, 16 C. 627 (P.C.), 25 P.R. 1886,

Limitation Act (Continued).

20 P.R. 1887, 63 P.R. 1888, 97 P.R. 1889, 9 P.R. 1897, 29 B. 61, 13 C. 292, 26 C. 51, 17 M. 122 and 30 C. 539 (P.C.), R.

(32) S. 19—*Acknowledgment of liability—Existing liability—Acknowledgment, terms of—Event, subsequent—External evidence not allowed—Recital in plaint.*

The acknowledgment of liability mentioned in S. 19 of the Limitation Act means an acknowledgment of existing liability (a).

Whether an acknowledgment is an acknowledgment of an existing liability or not, depends upon the terms of the acknowledgment, and external evidence of subsequent events cannot be relied upon with a view to show that there was an existing liability at the time and thus to place upon the acknowledgment an interpretation of which it would not otherwise admit (b).

Shortly after a mortgage had been executed, a *zurpeshgi* was granted by the mortgagor under which the usufructuary mortgagees undertook to pay, out of the annual rent, certain specified sums during certain specified years to the plaintiffs. They defaulted to do so and the mortgagor brought a suit against them. The plaint in that suit recited the terms of the *ticca potta*, in favour of the plaintiff.

Held, the acknowledgment was not sufficient to take the case out of the Statute of Limitation. **Ram Khelwan Mahto v. Nanhoo Singh**, 6 C.L.J. 544.

MOOKERJEE and HOLMWOOD, JJ.

References:—(a) 30 C. 699=7 C.W.N. 651; 25 M. 220, 26 M. 34=12 M.L.J. 101, R. (b) 26 M. 34=12 M.L.J. 101, F.

(32-a) S. 19—See No. 23, *supra*.

(33) S. 19, art. 179—*Execution of decree—Attachment of decree—Representative—Compromise by judgment-debtor—Acknowledgment—Not addressed to the person entitled.*

A petition, in which the judgment-debtor agreed to pay a certain sum to the person who attached the decree and took out execution, constitutes an acknowledgment of liability to the decree-holder's representative. Hence an application for execution by the decree-holder within 3 years from the date of such petition is not barred.

A person attaching a decree is a representative of the decree-holder (a).

A judgment-debtor, in acknowledging his liability even for a part of his liability under

Limitation Act.—(Continued).

the decree, makes such an acknowledgment as under S. 19 of the Limitation Act gives rise to a new period of limitation (b).

It is sufficient acknowledgment to save limitation under the explanation to S. 19 of the Limitation Act, although it was not addressed to the person entitled (c). **Brojo Nath Saha v. Gaya Sundarl Dassya**, 6 C.L.J. 141.

RAMPINI and WOODROFFE, JJ.

References :—(a) 15 C. 371, *F*; (b) 25 I.A. 95 = 25 C. 844 = 2 C.W.N. 402, *R*; (c) 33 C. 1047 (P.C.) = 4 C.L.J. 94 = 10 C.W.N. 874, *R*.

(34) *Ss. 19 & 20 and Arts. 59 and 60—Acknowledgment—Part-payment—Hand-writing of person making payment—Credit of interest in books—Banker and customer—Current account—“Debt”—“Deposit”*.

The ordinary dealings between a native banker, and his customers are in the nature of loans made by the latter to the former. Art. 59, Limitation Act, therefore, applies to a suit brought by a customer, to recover from his banker money held by the latter in current account; Art. 60 not being intended to apply to a transaction which is regarded by the law as a loan (a).

* An acknowledgment in writing not purporting to be signed by the defendants, or their predecessor in title, is useless as an acknowledgment within the meaning of S. 19, Limitation Act.

A part-payment of the principal of a debt must appear in the hand-writing of the person making the part-payment, and, not in that of any other person, however authorised (b).

A mere credit or interest in the debtor's books could not be regarded as equivalent to a payment of interest (c) within the meaning of S. 20, Limitation Act. **Dharam Das v. Ganga Devi**, 4 A.L.J. 628 = A.W.N. (1907), 263.

KNOX, A.C.J. and DILLON, J.

References :—(a) 16 Cal. 25 and 18 Mad. 390, *Diss.* (b) 23 C. 546, *F*. (c) 13 Bom. 338 and A.W.N. (1906), 212, *F*.

(35) *S. 20, proviso—Endorsement being authorised by debtor—Time for endorsement*.

The proviso to S. 20 of the Limitation Act makes no mention of the endorsements being authorised by the debtor. The payments must be authorised by the debtor, but so long as the payer is authorised to pay, he requires no special authority to endorse. Neither does the proviso

Limitation Act.—(Continued).

specify the time at which the endorsement should be made. **Babu Chimanbux Bhowsingha v. Surju Banniah**, 4 L.B.R. 1.

IRWIN, J.

Reference :—17 M. 92, *R*.

(35-a) *S. 20.—See Nos. 15 and 34, supra.*

(36) *S. 22—Claim for money maintainable against some of the representatives of a deceased debtor—Addition of other representatives after period of limitation.*

Where two out of four representatives of a deceased debtor were originally impleaded to recover a debt incurred by the deceased and the remaining two were added after limitation had run out.

Held, that, in the absence of any peculiar circumstances to the contrary, a suit for money due from a deceased debtor is maintainable against some of his representatives and that the suit against the original defendants does not become barred by limitation in consequence of the provisions of S. 22 of the Limitation Act (a).

As the lower Court had found, on the merits, for plaintiff, the single Bench decreed the claim against the original defendants without remanding the case to the lower Court. **Bawa Nanak Sing v. Ali Sher**, 32 P.W.R. 1907.

JHONSTONE, J.

Reference :—(a) 81 P.R. 1905, *F*.

(37) *S. 22—Addition of party by Court after period of limitation—Effect—Civil Procedure Code (Act XIV of 1882), S. 32.*

When, in a suit, a person is added as a party defendant, at the instance of the Court, after the period of limitation applicable to the suit has expired, S. 22 of the Limitation Act applies and bars the plaintiff's remedy as against the added defendant (a). **Ramkinkar Biswas v. Akhil Chandra Choudhuri**, 11 C.W.N. 350 (F.B.) = 5 C.L.J. 242 = 2 M.L.T. 137.

MACLEAN, C.J., HARRINGTON, BRETT, MITRA and GEIDT, JJ.

References :—24 C. 640, 4 C.W.N. 459 = 27 C. 540, overruled 12 C. 642, explained; 10 C.W.N. 551 = 3 C.L.J. 516, approved.

(38) *S. 22—Pre-emption-suit—Assignment by vendee pending the suit—Assignee added, as co-defendant after limitation for suit expired, effect of.*

S. 22, Limitation Act, does not apply, where the added defendant derives his title from the

Limitation Act.—(Continued).

original defendant, by an assignment pending the suit. The words "when a new plaintiff..... added after the institution of the suit," in S. 22 mean a person, who claims in his own right. But when the interest set up by the added party is only derivative, acquired pending the suit, then he is not a new defendant or plaintiff, and the case is one merely of continuation of the original suit with leave of Court under S. 372, Civ. Pro. Code, without any change in the date of its institution. A suit for pre-emption, therefore, is not barred by limitation, by reason of a person deriving title from the vendee-defendant, after the institution of plaintiff's suit, having been joined as a co-defendant, after the expiry of the stipulated period. **Fattah Muhammad v. Said Ahmad**, 3 P.R. 1907 = 42 P.W.R. 1907.

LAL CHAND, J.

References :—5 C. 720, 23 A. 331, 68 P.R. 1879, 7 P.R. 1906, R. 25 P.R. 1903, 25 C. 409, D.

(39) S. 22—Substitution of executors as defendants in place of supposed legal representatives—Whether new defendants—See ACT VIII OF 1885 (TENANCY), No. 27, 12 C.W.N. 8.

(40) S. 22—Suit for dower, necessary parties to—*Pro-forma* defendant—No relief claimed—Limitation arises between whom—See MUHAMMADAN LAW (DOWER), No. 3, 6 C.L.J. 558.

(41) S. 22—Substitution of assignee as plaintiff in place of assignor—See CIV. PRO. CODE, No. 210, 11 C.W.N. 521.

(42) S. 23, Sch. II, Art. 29—Attachment before judgment—Suit for compensation—Limitation—*Terminus a quo*.

Held that the limitation applicable to a suit for damages, on account of the alleged unlawful attachment before judgment of a shop belonging to the plaintiff, was that prescribed by art. 29, and that limitation began to run from the date of the attachment (a).

Semble that such an attachment, if wrongful, is not a continuing wrong within the meaning of S. 23 of the Act. **Ram Narain v. Umrao Singh**, A.W.N. (1907), 194 = 4 A.L.J. 548 = 29 A. 615.

BANERJI, J.

References :—(a) 23 M. 621, 27 M. 346, 24 W.R. 298, F; G Bom. L.R. 704, D.

(43) S. 23, Sch. II, Arts. 34, 35 and 120—Limitation for suits for restitution of conjugal rights—Mahomedan parties.

Limitation Act.—(Continued).

In the case of a marriage between two Mahomedans, there is certainly a contract. There may be something more than a contract in such a marriage; but still, if there is a contract and there is a breach of such a contract, a cause of action would arise, when the restitution is demanded and refused. A suit for restitution is governed by Art. 35, which, in distinct terms, lays down the limitation for such suits, provided the wife was, at the time of the demand and refusal, of full age and sound mind. If she was not of full age and sound mind at the time, a suit for restitution would be governed by Art. 120, as no limitation for such a case is provided elsewhere in the schedule. The view that, having regard to the provisions of S. 23, there would be no limitation to a suit like the present, cannot be accepted. Otherwise, Arts. 34 and 35 would be surplusage. **Asirunnessa Khatun v. Buzloo Meah**, 34 C. 79 = 11 C.W.N. 437.

GHOSE and CASPERSZ, JJ.

Reference :—25 B. 644, Appr.

(44) S. 23, Sch. II, Arts. 120, 144 and 178—Declaratory suit, limitation.

Held, (i) that Art. 178, Sch. II of the Limitation Act, prescribes the period of limitation applicable to an application for substitution, when upon the death of one respondent the right of appeal survives against the remaining respondents alone;

(ii) That the period of limitation applicable to a suit for declaration of title is six years from the date when the right to sue accrues, under Art. 120, Sch. II of the Limitation Act (a). S. 23 of the Limitation Act has no application to such a case (b). **Shyamanand Das v. Raj Narain Das**, 4 O.L.J. 568 = 11 C.W.N. 186.

RAMPINI and MOOKERJEE, JJ.

References :—(a) 1 C.L.J. 73, F. (b) 20 C. 906, D.

(45) S. 28, applicability of, to persons in possession, against whom a suit has been brought in respect of property so as to prevent them from offering any defence they please. See CUSTOM (PUNJAB), No. 48, 3 P.W.R. 1907.

(46) S. 28, Arts. 10, 12, 44, 111, 136, 137, 138, 147, 165, 166, 167 and 172—Meaning of 'sale'—Plea in defence that transfer is invalid whether avails in subsequent suit by defendant.

Limitation Act.—(Continued).

The word 'sale' in Art. 44 covers an assignment for a price of the ward's interest whatever that be, and not merely a sale, in the sense in which it is used in S. 77 of the Contract Act, or S. 54, Transfer of Property Act. Probably in Arts. 10 and 136, the transfer intended is that of ownership, but in all the other articles mentioned above the word includes a transfer for a price, without reference to whether the interest amounts to ownership.

During the plaintiff's minority, his guardian sued upon a mortgage, obtained a decree for possession of the mortgaged property and subsequently transferred the right of the plaintiff under the decree to the defendant. The latter sued for recovery from the plaintiff of part of the lands comprised in the decree, which the guardian purported to transfer to the defendant. The suit was dismissed on the ground that the assignment by the guardian was invalid and without the permission of the Court. Plaintiff thereupon sued for possession of lands, which, though comprised in the decree in his favour obtained by the guardian, did not form part of the property, to which the suit by the defendant against the plaintiff related. This suit was instituted by the plaintiff long after the expiry of three years from the time when he attained his majority, though within twelve years from the date of the original decree obtained by the guardian. *Held* that the plaintiff's right to the property in question had become extinguished by the operation of Art. 44 and S. 28, Limitation Act (a).

Held also that, although it was competent to the plaintiff to defend, in the previous suit, his right to the lands in his possession, by relying on the invalidity of the transfer by the guardian, notwithstanding he had not sued to set it aside within three years from the time he attained his majority (b), a finding with reference to such a defence, though necessary for the purposes of that litigation, cannot operate to relieve the plaintiff from the consequences of his failure to have the transfer set aside, within the time limited by law, in regard to property, of which possession had passed to the defendant under the transfer. *Latchiah v. Mukhallinga*, 17 M.L.J. 220=2 M.L.T. 350=30 M. 351.

WHITE, C. J., and SUBRAHMANYA AIYAR, J.

References :—(a) 23 M. 279, 19 M. 250, F; (b) 17 M.L.J. 19, R.

Limitation Act.—(Continued).

(47) Arts. 6, 68, 115—Suit for recovery of penalty under Madras Local Boards Act—See ACT V of 1884 (LOCAL BOARDS MADRAS), No. 1, 17 M.L.J. 537.

(48) Art. 10—*Lease and subsequent sale of land—Sale taking effect after expiry of lease—Suit for pre-emption—Limitation.*

Where there is a registered sale-deed, a suit for pre-emption will be governed by the first part of the third column or by the second part of the third column of Art. 10, according as the subject of sale is or is not capable of physical possession.

Where a separated share of a field is first leased and subsequently sold to the same person by a registered sale-deed, but the sale is to take effect only after the expiry of the lease, the lease does not merge in the sale (a), and time for a suit to enforce the right of pre-emption on such land begins to run from the date on which the sale is to take effect (b). *Yesaji v. Ramkrishna*, 3 N.L.R. 142.

BATTEN, A.C.J.

References :—(a) 24 A. 17, D., (1900) 2 Ch. 368, (1903) 1 Ch. 63, R. (b) 3 A.L.J. 191 (P.C), R.

(49) Art. 10—Suit by pre-emptor against vendee's transferees—Article applicable—See PRE-EMPTION, No. 18, 106 P.R. 1907.

(49-a) Art. 10—See No. 46, *supra*.

(50) Arts. 10 and 120, Sch. II—*Right of pre-emption in respect of a mortgage by conditional sale, suit for enforcing, whether governed by Art. 10 or 120.*

Long after a mortgage by a conditional sale for a certain term, the present plaintiffs sued for enforcing their right of pre-emption, arising in relation to the mortgage, asserting themselves to be "biswadars in the village and co-sharers in the patti." The question of limitation for the suit was raised and argued in appeal on the assumption of the applicability of Art. 10 to the suit. *Held*, that Art. 10 was inapplicable to the case, since there was no registration of any deed of sale as such, but the article that could properly govern the suit was Art. 120 and the suit was within the six years prescribed for it, the period having to be counted from the expiry of the year of grace given under Regulation XVII of 1806 (a). *Sheoji Singh v. Sheoji Singh*, 129 P.R. 1906=84 P. L.R. 1907.

JOHNSTONE & HURRY, JJ.

Limitation Act.—(Continued).

References:—(a) 108 P.R. (1901) (F. B). F. 97 P.R. 1880, 10 P.R. 1831 & 80 P.R. 1893, R.

(51) *Art. 11—Dismissal of application under S. 278 of Civ. Pro. Code for default—Order made without investigation—Applicability of the article.*

When an application under S. 278 of the Civ. Pro. Code is dismissed for default, it is impossible to hold that there has been an investigation on the merits so as to satisfy the test which Art. 11 of the Limitation Act requires. To such a case the article, therefore, does not apply. **Saraba Subba Rao v. Kani-sala Thinamayya**, 17 M.L.J. 554.

WHITE, C.J., and MILLER, J.

*References:—*29 M. 225, 1 C.W.N. 24, 11 C.W.N. 487, F.

(51-a) *Art. 11—Auction purchaser—Resistance to his taking possession—Enquiry—Application dismissed for default—Regular suit—Limitation—See Civ. Pro. Code, No. 196, 11 C.W.N. 487.*

(52) *Sch. II, Art. II—Applicability of—See Civ. Pro. Code, No. 197, 6 C.L.J. 362.*

(53) *Art. 12—See ACT I OF 1895 (PUBLIC DEMANDS RECOVERY, BENGAL), No. 4, 5 C.L.J. 638.*

(54) *Art. 12 of the Act does not apply to a suit to set aside a sale in execution, by a party not bound by the sale—See EXECUTION SALE, No. 2, 4 L.B.R. 40.*

(54-a.) *Art 12—See No. 46, supra.*

(55.) *Art. 12 (a.)—Sale under mortgage decree—Suit for redemption after sale by person interested and not made a party—Sale to be set aside before such suit—Limitation—See TRANSFER OF PROPERTY ACT, No. 49, 11 C.W. N. 1078.*

(56) *Arts. 12, 95 and 120—Certificate sale, setting aside—Fraud—Joint owner—Recovery of property.*

Where the notice required by S. 10, of the 'Public Demands Recovery Act (I of 1895 B. C.) has not been served, the certificate has not the effect of a decree and a suit to set aside a sale on such a certificate is not governed by Art. 12 (b) but by Art. 120, Sch. II of the Limitation Act.

Where the sale is sought to be set aside on the ground of fraud, and fraud is established, the article applicable to the suit is Art. 95 and not Art. 12. This is none the less so, because

Limitation Act.—(Continued).

the plaintiff may, from an entirely different stand-point, be entitled to the benefit of S. 18.

Where a plaintiff, one of several co-sharers, has lost his property by reason of the fraud of his co-sharers, who have purchased the property, the sale need not be formally set aside, but the plaintiff may obtain relief by getting the property reconveyed to him. Art. 95 would apply to a suit of this description. **Sham Lal Mandal v. Nilmani Das**, 5 C.L.J. 385 = 34 C. 241.

MOOREJEE and HOLMWOOD, JR.

*References:—*27 C. 698, 23 C. 775, 6 C.W.N. 630, 1 C.L.J. 550, 2 C.L.J. 504, 1 C.W.N. 516, 27 I. A. 216 = 25 B. 337, 9 M. 457, 1 C.L.J. 584 = 32 C. 296, 2 C. 8 (Note), 28 C. 475, 29 I.A. 99 = 29 C. 395, 6 A. 406, 11 B. 119, 3 C. 504, 6 A. 75, 10 M.I.A. 540, 3 C. 300, R.

(57) *Arts. 12, 120—Suit to set aside sale—Non-service of notice—See ACT I OF 1895 (PUBLIC DEMANDS RECOVERY, BOMBAY). No. 5, 5 C.L.J. 686.*

(58) *Arts 12 and 142—Suit to set aside sale on ground of non-service of notice under Public Demands Recovery Act—See ACT I OF 1895 (PUBLIC DEMANDS RECOVERY), Nos. 3 and 2 11 C.W.N. 745 and 11 C.W.N. 756.*

(59) *Art. 14—Order by a Collector to put a person in possession of a village—(Tiring possession of a wrong village—Rule 20, Ganjam and Vizagapatam Agency Rules—S. 244 Civ. Pro. Code, applicability to agency tracts.*

Where a person, who was entitled to the possession of a village, in pursuance of an order of the Collector, made under S. 265 of the Civ. Pro. Code, was put into possession of a wrong village by reason of a mistake having been made as to the village mentioned in the order, held, that he was entitled to sue for the possession of the village, to which he was rightfully entitled, without setting aside the act done, under mistake of fact; such an act being a mere nullity, Art. 14 of the second schedule of the Act had no application (a).

The High Court has power, under Rule 20 of the Ganjam and Vizagapatam Agency Rules, to direct the Agent to review his judgment on the "special ground" that the judgment of the Agent on a question of limitation was wrong.

Quære—Whether S. 244 of the Code of Civil Procedure applies to Agency tracts. Maharaja

Limitation Act—(Continued).

of **Yijlanagaram v. Somasekara**, 17 M.L.J. 147=2 M.L.J. 195=30 M. 280.

WHITE, C. J., and MILLER, J.

Reference :—(a) 38 C. 693, applied.

(60) *Sch. II, Arts. 14, 17, 18 and 120.*

A suit to recover compensation for land acquired, instituted on the refusal of the Collector to award any compensation under the Land Acquisition Act, is governed by Art. 120 of Sch. II of the Limitation Act, the right to sue accruing either from the date of the acquisition or the refusal by the Collector to award compensation. Art. 17 has no application where the amount of compensation has not been determined. Art. 14 also does not apply, the suit not being one to set aside an act or order of an officer of Government in his official capacity. Art. 18, which applies to suits for compensation for non-completion and refusal to complete an acquisition, cannot also apply to such a case. **Maharaja Sir Rameswar Singh v. The Secretary of State for India in Council**, 11 C.W.N. 356=5 C.L.J. 669=34 C. 470.

MOOKERJEE and HOLMWOOD, JJ.

References :—30 I.A. 60, 22 B. 802, 27 M. 538, referred to.

(60-a) Art. 17—See No. 60, *supra*.

(60-b) Art. 18—See No. 60, *supra*.

(61) *Art. 23—Suit for compensation for malicious prosecution—“prosecution is otherwise terminated”—Accused not before Magistrate at trial—Formal order of discharge unnecessary.*

A formal order of discharge or acquittal need not be made, to enable the plaintiff (accused) to maintain a suit for compensation for malicious prosecution, and a pronouncement of the plaintiff's innocence by the Magistrate is enough. Although the plaintiff (accused) was not before the Magistrate at the time of the trial, his prosecution must be taken to have come to an end, on the date of the Magistrate's final judgment, pronouncing his innocence. Limitation for the suit for compensation runs from the date of such final judgment, and not from an earlier date, on which the Magistrate came to a conclusion about the plaintiff's innocence. **Yonkatramana Aiyar v. Swami Naik**, 17 M.L.J. 60.

WHITE, C. J. and MILLER, J.

(61-a). Art 29—See No. 42, *supra*.

Limitation Act—(Continued).

(62) *Art. 31, Sch. II, applicability of, to suit, against a Railway Company for non-delivery of goods.*

Article 31 of the Act (as amended by Act X of 1899) was held to govern suits against a Railway Company for compensation for non-delivery of goods, whether the failure to deliver was tortious or was due to a breach of contract, and argument advanced as to the applicability of Art. 49 to this case was held untenable, for the reason that there was no wrongful conversion by the Railway Company, since the course, which they adopted of selling the goods, was one expressly authorised by the Railway Act, 1890. **Moti Ram v. East Indian Railway Company**, 108 P.R. 1906 (F.B.)=2 P.L.R. 1907=30 P.W. R. 1907.

CHATTERJI, KENSINGTON and CHITTY, JJ.

References :—19 B. 165 and 26 B. 562, F. 3 M. 107 and 240 and 12 C. 477, Diss.

(62-a) Art. 34—See No. 43, *supra*.

(62-b) Art. 35—See No. 43, *supra*.

(62-c) Art. 44—See No. 46, *supra*.

(63) *Arts. 48, 90, 115 and 120—Limitation—Suit to recover money given to defendant to be delivered to a third person.*

A gave Rs. 300 to B in order that it might be delivered to C, who had, a few days previously, executed a mortgage in favour of A. B also executed a bond guaranteeing the repayment of the loan by C. On suit by A against B and C, which was decided on the 15th of January, 1901, it was discovered that B had never paid the money to C. On the 1st of December, 1904, A sued B to recover the Rs. 300 paid to him as above described. Held that the rule of limitation applicable was that provided for by article 48 (if not by article 90 or 115) of the Indian Limitation Act, 1877, and the suit was time-barred. **Ram Lal v. Ghulam Husain**, A.W.N. (1907), 181=4 A.L.J. 671=29 A 579.

AKMAN and GRIFFIN, JJ.

Reference :—5 A. 341, R.

(64) *Sch. II, Arts. 48 and 109—Suit to recover rents realised by trespasser—Zurpeshgidar realising rents after expiry of lease—Limitation—‘Specific moveable property,’ meaning of—Suit of Small Cause nature of less than Rs. 500 in value—Order of remand, appeal from—Civ. Pro. Code, Ss. 586 and 588, cl. (38).*

Limitation Act.—(Continued).

A suit brought by an owner of land for the recovery from *zurpeshgidar* of rents realised by the latter from the tenants after the expiry of the *zurpeshgi* lease, is governed by Art. 109 of Sch. II of the Limitation Act, and not by Art. 48.

By "specific moveable property" in Art. 48 is meant property which can be specified by the delivery of the identical subject, and does not cover money (a).

An appeal from an order of remand passed by the appellate Court is specifically given by cl. (28) of S. 588, C.P.C., which bars a second appeal in suits of a Small Cause nature of below Rs. 500 in value, does not exclude an appeal from an order of remand passed in such a suit. **Agandh Mahto v. Khajah Allulah**, 11 C.W.N. 862.

MITRA and CASPERSZ, JJ.

References:—(a) 5 A. 341, *Diss.*, 11 B. 133, 8 B. 19, F.

(65) *Art. 49—Moveable property delivered to defendant under erroneous order of Magistrate—Suit to recover same by true owner—Limitation.*

When possession was taken by the Magistrate under a warrant, the property lapsed into legal custody, and that custody during its continuance must be held to be for the benefit of the owner (a). It follows that, when, under the erroneous order of the Magistrate, the defendant took possession of the paddy for his own purposes, he was guilty of a conversion which gave to the true owner (plaintiff) a cause of action. In such cases, time runs under Art. 49 for 3 years from the date when the property is wrongfully taken (b). **Ramaswamy Iyer v. Muthuswamy Iyer**, 1 M.L.T. 397=16 M.L.J. 541=30 M. 12.

SUBRAHMANTIA IYER and MILLER, JJ.

References: (a) 26 M. 410, F. (b) 7 B. 427, D.

(66) *Sch. II, Arts. 57 and 61—Contract Act, S. 68—Minor, suit for money advanced to—Registration of bond executed by guardian—Extension of period of limitation—Necessaries supplied to minor—Money advanced to minor for litigation purposes.*

The plaintiff lent some money under a registered bond to the guardian of a minor to meet the expenses of a litigation in which the minor was concerned, and brought the present suit to recover the money against the minor, after the

Limitation Act.—(Continued).

expiration of three years from the date when the loan was made.

Held, that the claim was barred under Art. 57, and the registration of the bond could not extend the period of limitation against the minor.

Held, further, that the suit could not be maintained by the plaintiff under S. 63 of the Contract Act, inasmuch as she had not pleaded nor proved that the money advanced by her was necessary for the minor. It was not sufficient merely to prove that the money was spent for the purposes of the minor. **Anjuman Ara Begam (Nawab) v. Nawab Anjuman Ara Begam**, 10 O.C. 38.

SCOTT and CHAMIER, J.CS.

References:—L.R. 3 Exch., 63, 13 Q.B.D. 410, 19 Q.B.D. 509, R.

(67) Arts. 57 and 85—See ACCOUNTS, No. 1, 6 C.L.J. 158.

(67-a) Art. 59—See No. 34, *supra*.

(67-b) Art. 60—See No. 84, *supra*.

(67-c) Art. 61—See No. 66, *supra*.

(68) *Sch. II, arts. 61 and 83—Limitation—Suit on bond to recover money of which a third party has in fact had the benefit—Compromise of suit by heirs of obligor—Suit to recover money paid under compromise—Contract Act, Ss. 69 and 70.*

U. S. borrowed money on a bond from U.R. The sole obligor of the bond was U.S., but the money was in fact borrowed for the use of, and was paid to, one M. From time to time, the original bond was renewed, and ultimately U. R. sued upon the last bond and obtained a decree for a large sum of money against the heirs of U. S. The defendants appealed to the High Court, but, pending the appeal, entered into a compromise with the plaintiff on the 2nd of January, 1900, whereby they agreed to pay to the plaintiff the sum of Rs. 51,000 and costs of the High Court. Upon the 5th of November, 1902, the heirs of U. S. paid to the plaintiff decree-holder in pursuance of this compromise Rs. 40,000, and on the 17th of July, 1903, they instituted a suit against M. to recover the amount so paid and their costs. *Held* that, on the facts, U. S. was not a surety for M., but the principal debtor, although the money was borrowed for M.'s benefit; that the payment made on the 5th of November, 1902, in pursuance of the compromise referred to above, was not gratuitous, and that the heirs

Limitation Act.—(Continued).

of U. S. were entitled to recover from M. the sum of Rs. 40,000 so paid with interest, but not the costs of the High Court, in respect of which the suit was barred. **Girraj Singh v. Mul Chand, A.W.N.** (1907), 214=4 A.L.J. 501=29 A. 627.

KNOX, C.J. and AIKMAN, J.

References:—8 C.B. 545, 2 I.A. 131, R.

(69) *Arts. 62 and 120—Suit against benamidar for recovering rent received by him.*

Where the rent received by the defendant is money payable by him as *benamidar* to the plaintiff, the real owner, for money received by the former for the latter's use, Art. 62, and not Art. 120, applies to a suit by the latter against the *benamidar* for recovery of the amount so received. **Subhanna Batta v. Kunhyanna Batta**, 17 M.L.J. 224=30 M. 298=2 M.L.T. 332.

BENSON and BODDAM, JJ.

References:—21 M. 373 and 25, A 62, F. 32 C. 527, R.

(70) *Arts. 62 and 120—Void assignment of mortgage debt—Payment by mortgagor to the assignee—Suit by assignor for recovery of money so received—Article applicable.*

Where an assignment of a mortgage debt was void *ab initio*, a suit by the assignor for the recovery of money received by the assignee from the mortgagor is a suit for money "had and received." The Article applicable is Art. 62 and not Art. 120. **Shanmuga Yela Pillai v. Govindaswamy**, 17 M.L.J. 452=30 M. 459.

SUBRAHMANIA AIYAR, J.

References:—32 C. 532, F. 5 C. 597, Diss; 7 A. 25, 10 C. 860, 15 M. 352, Distgd.

(70-a) *Arts. 62, 120 and 131—Suit for arrears of Jaghir by grantee from Government.*

This was a suit for recovery of a certain sum of money as arrears of Jaghir payable annually by Government from the defendant, who claimed to receive it under a decree obtained by him against a former grantee. The plaintiff urged that Art. 131 applied. *Held*, that Art. 131 applies only to a suit to establish the plaintiff's right to a periodically recurring right, and that it does not apply to a suit for recovery of a specific sum of money as arrears. Having regard to the circumstances of the particular case, *held* that Art. 120, and not Art. 62, of the Act governed the suit. **Dost Muhammad**

Limitation Act.—(Continued).

Khan v. Sohan Singh, 83 P. R. 1906=89 P.L.R. 1907.

JOHNSTONE and RATTIGAN, JJ.

References:—10 M. 115, Diss. 146 P.R. 1882, 154 P.R. 1889, 108 P.R. 1901, Dist.

(70-b) Art. 64—See No 23, *supra*.

(70-c) Art 68—See No. 47, *supra*.

(71) *Sch. II, art 75—Instalments, money payable by—Default in payment of two instalments—"One instalment," meaning of.*

Held, that, where it is provided in a bond that in case of default of payment of two instalments the whole of amount of the bond will be recoverable it is equivalent to a provision that the whole shall be due on the occurrence of the second default and art. 75 Sch. II. of the Limitation Act applies and if the suit is brought more than 3 years from the date of default in payment of two instalments, it is time barred. **Sirdhari Lal v. P. A. Labanti**, 10 O.C. 6.

CHAMIER, J. C.

References:—P. R. No. 74 of 1901 and 11 B. H.C.R. 155 F.

(72) *Sch. II, Art. 75—Instalment bond—Liberty to sue on default—Option not exercised—Jimitation—Acceptance of subsequent instalments—Waiver, implied.*

The defendants executed a bond in favour of the plaintiff, promising to pay the money by annual instalments; on failure to pay any instalment, the creditor was to be at liberty to recover the whole amount due. The instalment payable for the years 1305 and 1306 were paid, but not on the dates fixed for payment, but thereafter. The creditor brought this suit, to recover instalments for the years 1307-1309 Fasli. The defendants set up a plea of limitation. *Held* that the acceptance of the instalments after the appointed dates amounted to an implied waiver of the creditor's right to recover the whole money. Waiver is implied, when a person entitled to anything does or acquiesces in something else, which is inconsistent with that to which he is entitled. *Held*, further, that the suit was governed by Art. 75 of the Limitation Act, and the right to sue accrued, when an instalment fell due, in respect to that instalment (a). **Maharaja of Benares v. Nand Ram**, 4 A.L.J. 336=A.W.N. (1907), 139=29 A 431.

STANLEY, C.J., and BURKITT, J.

Limitation Act.—(Continued).

Reference :—(a) 3 A.L.J.R. 463, D.

(73) *Sch. II, Arts. 75 and 116—Instalment bond, registered—Cause of action—Default—Waiver—Limitation.*

Where, in an instalment bond, it was provided that, on default in the payment of one *kist*, the creditor would be able to realise the entire amount due under the bond,

held—that it was open to the creditor, if default were made, to sue at once for the whole amount, or if he so elected, to waive the benefit of the proviso.

Default was made in October 1897, and the present suit was brought in 1906 for the instalments for six years before suit.

Held—that the plaintiff was entitled to a decree, Art. 116 of Sch. II of the Limitation Act being applicable to the suit which was brought on a registered bond. **Rup Narain Bhattacharya v. Gopi Nath Mondol**, 11 C.W. N. 903.

MACLEAN, C.J., and CASPERSZ, J.

References :—13 C.L.R. 243, 6 C. 94, 6 B. 75, 9 C. 857, R.

(73-a) Art. 83—See No. 68, *supra*.

(73-b) Art. 85—See No. 67, *supra*.

(74) *Sch. II, Art. 90—Legal practitioner, suit for damages brought against—Gross negligence necessary to render him liable—Pleader, liability of, for wrong advice given by—Reasonable skill and diligence.*

Held that, in order to hold a legal practitioner responsible in law for the damages caused to his client by the wrong advice given by such practitioner, it is not enough to show that the advice given was wrong, but there must be proof of gross negligence on his part, and of the want of such reasonable skill and diligence, which is to be expected from a practitioner of his position.

Held also, that, the suit having been brought more than three years after the negligence of the defendant became known to the Bank, it was barred by limitation under Art. 90 of the second schedule of the Limitation Act (a). **Babu Manohar Lal v. Kashmiri Bank Ltd.**, 10 O. C. 95.

SCOTT and EVANS, J. CS.

References :—(a) 10 Bing., 57; 2 C. and P. 181; 12 Cl. and Fin. 91; 1 De. G.M. and G. 43, referred to.

Limitation Act.—(Continued).

(74-a) Art. 90—See No. 68, *supra*.

(75) Art. 91—Hindu widow—Alienation—Reversioner—Suit by reversioner to recover property.

Where the plaintiff sues to recover possession of property from the defendant, who relies on an alienation in his favour made by the widow of a preceding owner, and the alienation is not justified by any necessity recognised by Hindu Law, it is not open to the defendant to rely on Art. 91 of the Act, as a bar to the suit. **Rakhmabai Pandurang v. Keshava Raghunath Bhise**, 8 Bom. L.R. 675=31 B. 1.

JENKINS, C.J. and PEAMAN, J.

Reference.—32 C. 257, F.

(76) Art. 91—Undue influence in case of gift by son to father—Effect of delay and acquiescence—See CONTRACT ACT, No. 4, 17 M.L.J. 19,

(77) *Sch. II Arts. 91, and 141—Alienation by Hindu widow—Lease—Suit by reversioner to recover possession after widow's death—Reversioner not bound to set aside alienation—Limitation—Pleading—Paper-book—Inclusion of irrelevant papers not objected to by respondents—Costs.*

An alienation by a Hindu widow is *prima facie* voidable at the election of the reversionary heir. He may think fit to affirm it, or he may, at his pleasure, treat it as a nullity, without the intervention of any Court, and he shows his election to do the latter, by commencing an action to recover possession of the property. There is nothing for the Court either to set aside or cancel, as a condition precedent to the right of action of the reversionary heir (a).

A suit by the reversionary heir, to recover possession of properties leased by the widow, after the latter's death, is, therefore, governed by Art. 141 and not by Art. 91 of Sch. II of the Limitation Act.

It is not necessary for the reversionary heir, in such a suit, to pray for a declaration that the lease is inoperative. It is for the lessee to plead and prove circumstances to show that the lease is not, in fact, voidable, but is binding on the reversionary heir.

Where it appeared that the respondents did not object to the inclusion in the paper-book of papers absolutely irrelevant to the appeal, the Judicial Committee held that they could not deprive the successful appellants of any part of

Limitation Act.—(Continued).

their costs. **Bijoy Gopal Mukerji v. Krishna Mahishi Debi**, 11 C.W.N. 424 (P.C.)=5 C.L.J. 384=2 M.L.T. 188=17 M.L.J. 154=34 C. 329=9 Bom. L.R. 602=4 A.L.J. 329.

LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON and LORD ATKINSON.

References—(a) 1 C.W.N. 433=24 I.A. 164=25 C. 1, referred to.

(78) Arts. 91 and 141—*Reversioner, suit brought by, for possession of property alienated by Hindu widow—Suit to recover property alienated by a Hindu widow not a suit to set aside the alienation.*

Held, that a suit brought by a reversioner for recovery of possession of property alienated by a Hindu widow is governed not by Art. 91, but by Art. 141. **Jang Bahadur v. Mahant Madho Gir**, 10 O.C. 163.

CHAMBER, A.J.C.

References :—3 O.C. 105, 33 C. 257, F. 30 Cal. 990, Diss.

(79) Arts. 91 & 141—*Right of daughter's son to impeach alienation by maternal grandmother of property inherited from her husband—See HINDU LAW (WIDOW), No. 2, 3 N. L. R. 35.*

(80) Art. 95—*Fraud—Decree, suit to set aside.*

A took a *dur-putni* in the name of his son-in-law B. The putnidar, who was aware of the *benami* transaction, brought a collusive suit for rent against B, obtained a decree, executed it and purchased the property on the 20th June, 1891. A became aware of this fraud on the 29th July, 1892, and sued to recover possession on the 25th October, 1895:

Held, that the suit was not barred under Art. 95, Sch. II of the Limitation Act.

When a person is not a party to a decree or sale by an order of Court, and is in no way affected thereby, it is not necessary for him to have the sale set aside; he is entitled to possession of the land, from which he has been ousted, with mesne profits from the date of his dispossession. **Annada Pershad Panja v. Prasannamoyi Dasi**, 6 C. L. J. 17 (P.C.)=4 A.L.J. 467=11 C.W.N. 817=9 Bom. L.R. 743=17 M.L.J. 358=2 M.L.T. 397.

LORD ROBERTSON, LORD COLLINS AND SIR ARTHUR WILSON.

(80-a) Art. 95—See No. 56, *supra*.

(81) Arts. 95 and 120—*Fraud on the part of a qualified female proprietor—Consented*

Limitation Act.—(Continued).

decree obtained against her—Execution of the decree against reversioner—Reversioner's objection to such execution—Objection overruled—Subsequent suit by reversioner for declaration that decree not binding on him—S. 244, C.P.C.

The fraud, contemplated by Art. 95, is a fraud practised upon a party to decree or a party to a transaction in which the fraud was committed (a).

If a suit by the reversioner be viewed merely as a suit for declaration that a decree passed against a qualified female proprietor, for a debt alleged to be due by the last male owner, is not binding on him, then the suit would be barred under art. 120, if it be instituted more than six years from the date of the decree when his right, in so far as he has a right to institute such a suit, should be taken to have been infringed. But a person entitled to succeed as a reversionary heir is not bound to sue for such declaration, and it is open to him to wait till succession falls in, and if, thereafter, any thing is done constituting an actual injury to his vested right, then to pursue his remedy.

Where, therefore, a consent decree obtained against a qualified female proprietor, for a debt purporting to have been due by the last male owner, was executed against the reversioner in possession, overruling his objection that the decree was not binding on him as having been fraudulently obtained for a non-existent debt, held that the reversioner's right to bring a suit for declaration that the decree was not binding on him, was governed by Art. 120, the cause of action accruing from the date of attachment in execution and not from the date of decree (b).

Held, also, that the order overruling the objection of the reversioner against the execution of the decree was not a bar to a subsequent suit for declaration, as the question raised with reference to the validity of the consent decree was not one which could be tried in execution. S. 244 of the C. P. Code has no application to such a case, and there is no appeal from an order dealing with such objection. **Sundarappa v. Sriramulu**, 17 M.L.J. 288=2 M.L.T. 360=30 M. 402.

WHITE, C.J. and SUBRAMANIAM AIYAR, J.

References :—(a) 3 C. 504, F. (b) 14 B. 512 and 29 M. 390 (409), F. 11 B. 119, Diss.

(82) Art. 97—*Sale under Rent Recovery Act set aside by Civil Court—Purchaser's right to*

Limitation Act.—(Continued).

recover purchase-money—See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), No. 13, 17 M.L.J. 298.

(83) Arts. 97 and 16—Zuri-peshgi lease—possession not delivered to the mortgagee—Suit for recovery of possession—suit dismissed—suit for compensation.

A lease is granted to one R, and a mortgage is subsequently made of the same property to a person, the *benamidar* of R, both transactions being one and the same, but the mortgagee is kept out of possession of a portion of the property. He brings a suit for possession, but it is dismissed. He then brings a suit, more than six years after the date of the mortgage, to recover compensation for non-delivery of possession and for costs incurred in the first suit. *Held*, that the suit was one to recover damages for breach of contract, to which Art. 116, and not Art. 97, Sch. II, Limitation Act, was applicable, and the suit, having been brought more than six years after the date of the mortgage, was barred. **Madan Lal v. Reoti Singh**, 4 A.L.J. 249 = A.W.N. (1907), 108.

BANERJI and AIKMAN, JJ.

(83-a) Art. 109—See No. 64, *supra*.

(84) Arts. 110, and 132—Absolute occupancy tenant—Suit to recover arrears of rent charged upon land—S. 43, Central Provinces Tenancy Act.

A suit to recover arrears of rent from an absolute occupancy tenant, by enforcing payment of money charged upon land under S. 43 of the Central Provinces Tenancy Act, is governed by Art. 110 and not by Art. 132. Arrears of rent for any period in excess of three years cannot be recovered. **Gourishankar v. Laxmanprasad**, 3 N.L.R. 81.

BATTEN, A.J.C.

References:—16 C.P.L.R. 52, *F*; 11 C. P. L. R. 95, 14 C. P. L. R. 17, 1 N.L.R. 117, 7 A. 502, 21 A. 454, 22 B. 846, 24 M. 233, 27 C. 180, *R*.

(85) Arts. 110, and 132—Suit for recovery of arrears of rent—Personal remedy and real remedy—Limitation applicable to each.—See ACT XI OF 1898. (CENTRAL PROVINCES TENANCY), No. 1, 3 N.L.R. 164

(85-a) Art. 111—See No. 46, *supra*.

(86) Art. 118—Agreement to provide funds for litigation—Specific performance—See LITIGATION, No. 1, 10 O.C. 173.

Limitation Act.—(Continued).

(87) Arts. 113, 142, and 144—*Patni lease—Resumption by Government of Chowkidari Chakran lands—Suit by putnidar for possession of Chakran lands.*

Suit by putnidars to obtain possession of certain Chowkidari Chakran lands, to which they were entitled by virtue of a *patni lease* granted by the zemindar defendant in 1854. These lands were resumed by Government and made over to the zemindar in 1899. *Held* that, as the lands were not in possession of the plaintiffs nor in that of the defendant until they were made over to the latter by Government in 1899, the plaintiffs must be deemed to sue for specific performance of their contract of 1854, in respect of land, for which they had no claim against the defendant till 1899. The period of limitation applicable would, therefore, be that prescribed by Art. 113, and not Art. 142 or 144. **Ranjit Singh v. Radha Charan Chandra**, 34 C. 564.

RAMPINI and SHARFUDDIN, JJ.

Reference:—34 C. 109, *R*.

(87-a) Art. 115—See Nos. 47 and 63, *supra*.

(88) Sch II, Art. 116—Suit for compensation for breach of Contract in writing and registered, and suit for rent, difference between.

A suit for recovery of drainage charges payable by a tenant to his landlord under S. 42, cl. (b) and S. 44, sub-section 1 of the Bengal Drainage Act must, having regard to the provisions of cl. 2. of Sch. III of the Bengal Tenancy Act, be brought within three years from the last day of the Bengali year, in which the sum claimed fell due.

It is perfectly lawful for parties to substitute, for their statutory obligation under the Bengal Drainage Act, a contractual obligation (a).

Where, however, the contract of tenancy contains nothing more than a covenant by the tenant to pay to his landlord drainage charges in accordance with the Statute, and no contractual obligation is created in supersession or modification of the statutory obligation, but contains merely a recital of the statutory obligation, Art. 116, Sch. II of the Limitation Act has no application (b). **Naffer Chandra Maji v. Jyote Kumar Mukerjee**, 5 C.L.J. 19.

RAMPINI and MOOKERJEE, JJ.

References:—(a) 32 C. 1019, *R*. (b) 19 C. 1, *R*.

(89) Art. 116—Suit to be commenced within six years from the time when the contract was broken—See DAMAGES, No. 2, 6 C.L.J. 398.

Limitation Act.—(Continued),

(89-a) Art. 116—See Nos. 73 and 83, *supra*.

(90) Arts. 116, 178—Application for personal decree for balance of judgment-debt not realised at mortgage-sale—Limitation—See TRANSFER OF PROPERTY ACT, No. 61, 11 C.W.N. 674.

(91) *Art. 118—Suit against adoptee by reversioner of adopter for possession of adoptor's property in adoptee's possession.*

Where property is in the possession of a person as the adoptee, of the last male owner, a suit by a reversioner of such last male owner, for possession of the property, is governed by Art. 118 and time runs from the date, when the alleged adoption became known to the reversioner (plaintiff). **Ishar v. Partap Singh**, 38 P.R. 1907.

CLARK, C.J.

References :—56 P.R. 1903 (F.B.), 25 B. 387 (P.C.), 18 C. 308 (P.C.) R.

(92) *Art. 118—Suit for possession of immovable property—Invalidity of adoption—*

Held that a suit for possession of immovable property, on the ground that an adoption is invalid &c., is governed by Arts. 118, Limitation Act (a). **Mehar Singh v. Gurbachan**, 74 P.W.R. 1907.

JOHNSTONE, J.

Reference :—72 P.W.R. 1907, *Appr. and R.*

(93) Art. 118—Application of, to invalid adoptions—Distinction between invalid adoptions and inherently invalid adoptions—See CUSTOM (PUNJAB), No. 1, 1 P.R. 1907.

(94) *Arts. 118 and 141—Suit for possession—Hindu law—Reversioner—Plea of adoption.*

Suit by a reversioner for possession of land within 12 years from the death of a Hindu widow. Defendant set up an adoption.

The question for decision was whether Art. 118 or 141 of the Limitation Act applied to the case. *Held*, that the suit was governed by Art. 141 and not by Art. 118, even though the plaintiff had to displace the adoption. **Mangamma v. Veerayya**, 17 M.L.J. 182=2 M.L.T. 178=30 M. 308.

SUBRAHMANYA AIYAR and MILLER, JJ.

Reference :—(a) 33 I.A. 156. R

(95) *Arts. 118 and 141—Suit for possession by Hindu reversioner—Plea of adoption.*

A suit for possession of immovable property by a reversioner, brought after the death of a Hindu widow, is governed by Art. 141 and not

Limitation Act.—(Continued),

by Art. 118, even though the plaintiff has to displace an alleged adoption. **Rama Row v. Venkoba Row**, 17 M.L.J. 282.

WHITE, C.J. and MILLER, J.

References :—33 I.A. 156=28 A. 727 (P.C.) and 17 M.L.J. 182, F.

(96) *Sch. II, Art. 119—Adoption—Denial of factum and validity of adoption—Limitation.*

Art. 119 of Sch. II of the Limitation Act, 1877, applies to all suits in which either the factum or the validity of an adoption is denied.

The observations to the contrary in **Ningawa v. Ramappa (a)** and **Shivaram v. Krishnabi (b)** held to be *obiter dicta*. **Laxmawa Basappa v. Ramappa Yellappa**, 9 Bom. L.R. 1054.

CHANDAVARKAR and HEATON, JJ.

References :—(a) 5 Bom. L.R. 308, Diss.; (b) 8 Bom. L.R. 89, Diss.

(97) *Art. 120—Limitation of suit for pre-emption on conditional sales—Starting point of Limitation—Civ. Pro. Code, 1882, S. 203.*

Held, that limitation of a suit for possession of immovable property in the case of conditional sale is governed by Art. 120 of the second schedule to the Indian Limitation Act XV of 1877, and the cause of action to sue arises from the date of expiry of the year of grace and not from the date of the foreclosure decree.

Held, also, that in writing judgment in appealable cases, provisions of S. 203, C. P. C., should be strictly followed. **Sheo Lal v. Madan Mohan**, 4 P.W.R. 1907=27 P.L.R. 1907.

LAL CHAND and HURRY, JJ.

(98) *Art 120—Suit by a person in possession for a declaration of his title to certain property—Entry in revenue records of the title of defendant as owner—Subsequent partition—proceedings—Period of limitation.*

In a dispute between the plaintiffs and the members of a patti, the Revenue Authorities entered the names of the *pattidars* as owners, and the names of the plaintiffs as in possession. On appeal, the plaintiffs were directed to bring a regular suit under S. 45 of Land Revenue Act. As the plaintiffs were not disturbed in their possession, they did not bring any such suit. Subsequently, the *pattidars* applied for partition, and the Revenue authorities allowed partition, directing the plaintiffs to

Limitation Act.—(Continued).

bring a regular suit. The plaintiffs thereupon, sued for a declaration of their title. Held, that it was not obligatory on the plaintiffs' part to bring a suit after the first Revenue proceedings, inasmuch as they were not disturbed in their possession, and that the plaintiffs had a fresh cause of action from the date of the order of the Revenue Officer in the partition proceedings, and could bring the suit within six years from that date.

Hakim Singh v. Waryaman, 140 P.R. 1907.

ROBERTSON and SHAH DIN, JJ.

References:—27 P.R. 1831, 20 P.R. 1900, 88 P.R. 1882, 20 A. 35, *R.*

(99) Art. 120 is final and residuary, and not to be applied unless the case cannot come under any other article—See DEPOSIT, No. 1, 6 C.L.J. 535.

(99-a) Art. 120—see Nos. 20, 23, 28, 43, 44, 50, 56, 57, 60, 63, 69, 70, 70-a and 81, *supra*.

(100) Arts. 120, 132, and 147—Liability of sons in respect of mortgage executed by father—Exemption of sons' interest—Subsequent suit against sons for share of debt payable by them—Limitation—See HINDU LAW (DEBTS), No. 7, A.W.N. (1907), 159.

(101) Art. 125—Limitation—Alienation—Fictitious award—Hindu widow.

A Hindu widow, plaintiff in a suit to recover property, in respect of which she was entitled to a Hindu widow's estate from the possession of the widows of the other members of her husband's family, entered upon a collusive arbitration by which the whole of the property of the plaintiff's husband was divided amongst certain female members of the family, it being declared that each of the parties to the arbitration proceedings took an absolute estate in the share allotted to her. Held, that this proceeding amounted to an "alienation" of the property so dealt with within the meaning of article 125 of the second schedule to the Indian Limitation Act. **Ram Sarup v. Ram Dei**, A.W.N. (1907), 33 = 4 A.L.J. 160 = 29 A. 239.

STANLEY, C.J., and BURKITT, J.

(102) Art. 127—Adoption declared invalid—Suit by adopted son for partition of property in natural family—See HINDU LAW (ADOPTION), No. 3, 2 M.L.T. 184.

(102-a) Art. 131—See No. 70-a, *supra*.

(103) Art. 132—See HINDU LAW (DEBTS), No. 1, 11 C.W.N. 294.

Limitation Act.—(Continued).

(103-a) Art. 132—See Nos. 6, 84, 85 and 100, *supra*.

(104) Sch. II, Arts. 132, & 147—Simple mortgage, suit to enforce—Limitation—Transfer of Property Act (IV of 1882), S. 58, cls. (b) and (c), and S. 67—Interpretation of statute—Presumption against sudden change of policy by the Legislature—Re-enactment of provision of repealed statute—Presumption in favour of previous judicial interpretation being maintained—Staro decisis, doctrine of.

A suit to enforce the payment of money due under a simple mortgage, by sale of the mortgaged property, is governed by Art. 132 of Sch. II of the Limitation Act.

Art. 147 of Sch. II of the Limitation Act applies to the one class of mortgages, in which alone a suit can be, and always is, brought for "foreclosure or sale," viz., to English mortgages.

The above construction of Art. 147 adopted, because, whilst it gives reasonable effect to the language used, it, at the same time, (1) escapes the necessity of attributing to the Legislature a great and sudden change of policy, and (2) gives effect to the ordinary presumption that the Legislature, when it repeats in substance in a later Act an earlier enactment that has obtained a settled meaning by judicial construction, intends the words to mean what they meant before.

As there was a great diversity of opinion among the several High Courts on the point, the Judicial Committee had to decide between the conflicting opinions, though, had there been a uniform current of decision in India, their Lordships would have been very slow to interfere. **Yasudeva Mudaliar v. K. Srinivasa Pillai**, 11 C. W.N. 1005 (P.C.) = 4 A.L.J. 625 = 6 C.L.J. 255 = 2 M.L.T. 333 = 9 Bom. L.R. 1104 = 17 M.L.J. 444 = 30 M. 426.

LORD ROBERTSON, LORD COLLINS and SIR ARTHUR WILSON, JJ.

(105) Art. 134—Gift of mortgaged property by widow of usufructuary mortgagee—Mortgage by donee purporting to mortgage full proprietary interest in property—Foreclosure—Limitation—See TRANSFER OF PROPERTY ACT, No. 36, A.W.N. (1907), 183.

(106) Arts. 134, and 148—Redemption of mortgage by conditional sale—Time from which limitation is to be reckoned—Sale of part of

Limitation Act.—(Continued).

mortgaged property—*Bona fide* purchaser—Redemption of part of mortgaged property on payment of proportionate amount when claim as to part is barred.—See MORTGAGE (REDEMPTION), No. 15, 4 A.L.J. 375.

(107) *Art. 136, Sch. II—Suit by purchaser of equity of redemption for possession of mortgaged property—Value for purposes of appeal—Punjab Courts Act, S. 70 (1) (b)—Conversion of sale into mortgage.*

A Suit by the purchaser of the equity of redemption, for possession of the mortgaged property, is governed by Art. 136, and limitation runs from the date of redemption (a).

The value of the suit, for purposes of appeal, is the sum fixed as payable on redemption (b), and not thirty times the annual revenue, and an appeal lies under S. 70 (1) (b), Punjab Courts Act.

A vendor is entitled to include a petty sum in the sale consideration for current expenses, and it is an error to convert a sale by a limited owner into a mortgage, merely because a petty sum out of the consideration was paid in cash for current expenses and was not proved to have been for necessity. **Badri Mal v. Gopal**, 130 P.R. 1906=100 P.L.R. 1907.

REID, C.J., and ROBERTSON, J.

References:—(a) A. W. N. (1893), 67, F. (b) 24 P.R. 1903 (F.B.), F.

(107-a) *Art. 136—See No. 46, supra.*

(107-b) *Art. 137—See No 46, supra.*

(107-c) *Art. 138—Application under S. 318 of the Code made by auction-purchaser rejected as made beyond time, no bar to suit for possession of property purchased—See EXECUTION OF DECREE, No. 8, A.W.N. (1907), 131.*

(107-cc) *Art. 138—See No. 46, supra.*

(107-d) *Arts. 139, 141 and 144.*

The widow of a last Hindu male owner died, having let a part of her husband's property in her hands to the defendants as tenants-at-will. On her death, plaintiffs (reversioners) sued for possession of the lands in the hands of the defendants. The suit was filed more than 12 years after the death of the widow, but within 12 years from the date on which the defendants set up an adverse title. On the question of limitation, it was held, the possession of a tenant-at-will holding over the estate of a widow after her death, not being adverse to her reversioners until the expiration of the tenancy,

Limitation Act.—(Continued).

the cause of action to the reversioners begins to run only from the date of the tenant setting up an adverse title; and the suit in this case, having been filed within 12 years of the setting up of the adverse title, was not barred by limitation. **Shudu Singh v. Khushal Singh**, 90 P.R. 1906=91 P.L.R. 1907.

REID, J.

References:—43 P.R. 1901, 41 P.R. 1903, 24 B. 504 and 25 A. 435, F.

(108) *Sch. II, Arts. 139, & 143—Lease—Forfeiture—Suit for ejectment—Limitation.*

A lease granted for the reclamation of certain jungle lands provided that the lessee should hold the lands rent-free for six years, and that, in the beginning of the seventh year, he should cause the lands to be measured and a settlement of rent made in respect of the reclaimed lands—failing which, the landlord would be entitled to possession.

Held that a suit by the lessor for ejectment, on the ground of the lessee's failure to comply with the above-mentioned provision in the lease, was governed by Art. 143, and not by Art. 139 of Sch. II of the Limitation Act. **Goohi Sheikh v. H. Mathewson**, 11 C.W.N. 661.

MOOKERJEE and HOLMWOOD, JJ.

(109) *Art. 141—Hindu Law—Gift by widows of a portion of the property inherited by them from their husband—Subsequent adoption—Suit by the adopted son.*

The widows of one S adopted the plaintiff in 1878, in pursuance of the authority given to them by their husband. Prior to adoption, the widows made a gift of a portion of the property in favour of one K, and after her death, to her grandsons. K died in 1882 after adoption, and the grandsons of K got into possession of the property. The last surviving widow of S died in 1901. The plaintiff, as the adopted son of S, brought the first suit in 1904 for the recovery of possession of the property transferred to K.

Held, the suit was barred by time. The plaintiff's right to recover possession having arisen in 1882 on the death of K, K's grandsons, having remained in adverse possession for over 12 years, could not be ejected (a). **Sahdeo Singh v. Ramnandan Singh**, 4 A.L.J. 354=A.W.N. (1907), 148.

BANERJI and AIKMAN, JJ.

* *Reference*:—26 M. 143, D.

Limitation Act.—(Continued).

(110) *Art. 141, applicability of.*

Art. 141 of the Second Schedule of the Limitation Act applies to a suit brought by a reversioner to recover possession of the properties alienated by a Hindu widow. Roy Radha Kissen v. Nauratan Lall, 6 C.L.J. 490.

BRETT and MOOKERJEE, JJ.

(111) *Art. 141—Suit for possession by a reversioner entitled to possession after widow's death—Alienation by last male-holder—Limitation—Punjab Limitation Act (I of 1900), Art. 2.*

A suit for possession by reversioners, which is instituted on the death of the widow of the last male holder, who had alienated the property, and which was not maintainable during her life-time, she being incompetent to set aside the alienation, is governed by Art. 141 of the Limitation Act of 1877, and not by Art. 2 of the Punjab Limitation Act.

Art. 2 of the Schedule to the Punjab Limitation Act applies to a case, where the person, suing for possession is entitled to object to the alienation and to recover possession of the property alienated, on the death of the alienor, but not to a case where the reversioner is not entitled to sue for possession owing to the intervention of the widow's estate. *Miran Bakhsh v. Ahmad, 145 P.R. 1907.*

RATTIGAN & LAL CHAND, JJ.

(111-a) *Art. 141—See Nos. 77, 78, 79, 94 and 95, supra.*

(111-b) *Art. 142—See Nos. 58 and 87, supra.*

(112) *Arts. 142 and 144—Absence of intention of abandonment—Failure to cultivate unculturable land—Suit for possession.*

In the absence of motive for abandonment and of evidence of intention to abandon, or of adverse possession of the defendants for the statutory period, a suit by the plaintiff for possession is not barred by either Art. 142 or Art. 144. Failure to cultivate unculturable land does not constitute abandonment. *Shahabul Shah v. Gande Das, 53 P.R. 1907 = 39 P.L.R. 1907.*

REID, J.

References:—105 P.R. 1901, F; 109 P.R. 1892, 16 C. 473, R.

(113) *Arts. 142, 144, 148—Mortgage with possession—Trespass on mortgagor's interest—Redemption by trespasser, effect of—Rights of mortgagor—Trespasser's adverse possession—Onus of proof.*

Limitation Act.—(Continued).

Where a mortgagee is in possession of the mortgaged property, and a trespasser redeems it without the knowledge of the mortgagor, such redemption extinguishes the mortgage and the mortgagor can only sue to recover the interest from which he is ousted. The mortgagor, not being in possession, cannot be said to be dispossessed within the meaning of Art. 142, when a third person redeems without his knowledge. The case must, therefore, fall under Art. 144, under which the burden of proof lies on the trespasser to show when the possession became adverse. But before the trespasser can begin to be adversely in possession to the mortgagor, he must do something to affect the mortgagor with notice of his adverse claim. *Nga Kyaw Dun v. Mi Min Sin, U.B.R. (1906), Limitation, 9.*

SHAW, J. C.

References:—U.B.R. (1892-1896), II, 502, 509, U.B.R. (1897-1901), II, 461, 464, 469, 473 2 M. 226, 4 C. 327, 18 B. 51, R.

(113-a) *Art. 143—See Nos. 24 and 108, supra.*

(114) *Art. 144—Suit for possession of property—Defendant not succeeding in proving adverse possession for more than 12 years—suit not barred—See PLEADINGS, No. 2, 10 O.C. 17.*

(115) *Art. 144—Agreement between divided brothers as regards estate of a deceased divided brother—Widow of deceased not a party to the agreement—Limitation for enforcement of contract after widow's death—See HINDU LAW (REVERSIONERS), No. 3, 17 M.L.J. 505.*

(115-a) *Art. 144—See Nos. 44, 87, 107-b, 112 and 113, supra.*

(115-b) *Art. 147—See Nos. 6, 46, 100 and 104, supra.*

(115-c) *Art. 148—See Nos. 106 and 113, supra.*

(116) *Art. 149, applicability of, to suits by assignees from Government—See BENAMI TRANSACTIONS, No. 2, 17 M.L.J. 174.*

(117) *Art. 163—Rules 154, 155 of the Madras High Court (Original Side)—Application to set aside dismissal for default.*

An application to the Registrar of the Original Side, to issue a notice of motion under Rs. 154 and 155 of the Original Side rules, is an application within the meaning of Art. 163, Limitation Act, and it is none the less an application for the purpose of the article, because the affidavit referred to in the notice of motion was not in fact sworn till two days later, or

Limitation Act.—(Continued).

because the notice of motion states a date, which is beyond the statutory period, as the date on which the application will be heard. **Kuttayan Chetti v. Ellappa Chetti**, 17 M.L.J. 215.

WHITE, C.J., and MILLER, J.

References:—20 C. 899, 31 C. 150, *Diss.*

- (118) *Art. 161—Civ. Pro. Code, S. 108—Ex parte decree against more defendants than one—Execution against some of the defendants—Application by other defendants—Setting aside decree—Limitation.*

Where an *ex parte* decree is passed against more defendants than one, and the decree is executed against one of them only, then that is not an execution of process for enforcing judgment against the others, within the meaning of Art. 164 of Sch. II of the Limitation Act. The latter can, therefore, apply to have the *ex parte* decree set aside within thirty days of the date of any process in execution against them. **Hanmant Raghavendra v. Shhankar Raoji**, 9 Bom. L.R. 323 = 31 B. 303.

JENKINS, C. J., and BEAMAN, J.

Reference:—(1888) P.J. 56, *F.*

- (119) *Arts. 164 and 169—Scope of,—Applications to set aside original ex parte decree and to re-hear an appeal heard ex parte in the absence of respondent—See CIV. PRO. CODE, No. 75, 17 M.L.J. 436.*

- (119-a) *Art. 165—see No. 46, supra.*
 (119-b) *Art. 166—see No. 46, supra.*
 (119-c) *Art. 167—see No. 46, supra.*
 (119-d) *Art. 169—see No. 119, supra.*
 (119-e) *Art. 172—see No. 46, supra.*

- (120) *Art. 175—Execution of decree—Execution transferred to Collector—Partial execution—Application for instalments—See ACT XVII OF 1879 (DEKHAN AGRICULTURISTS' RELIEF, BOMBAY), No. 4, 8 Bom. L.R. 968 = 31 B. 120.*

- (121) *Sch. II, Art. 175, cl. (c)—Second appeal—Death of a respondent—Application by appellant for substitution of his heirs—Limitation—Civil Procedure Code, Ss. 582 & 587—Rent suit—Appeal by tenant if abates on failure to substitute one of several joint landlords in time—Res Judicata—Question of area on which rent assessable.*

When a respondent in a second appeal dies during the pendency of the appeal, an applica-

Limitation Act.—(Continued).

tion by the appellants to substitute his heirs on the record is governed by Art. 175, cl. (c) of Sch. II of the Limitation Act.

S. 587 of the Code of Civil Procedure must be read in conjunction with S. 582 of that Code and Art. 175, cl. (c) of Sch. II of the Limitation Act (a).

The appellants in a second appeal, who were defendants in a rent suit, not having applied to substitute the heirs of one of the plaintiffs-respondents within six months of his death ;

held that the second appeal, abated, so far as the deceased respondent was concerned. But the appellants were entitled to prosecute the appeal against the other respondents (b).

A tenant, whose defence that the landlord was entitled to rent in respect of a lesser area of land than was stated in his claim was dismissed on the merits in a previous rent suit, is precluded from raising the same defence in a subsequent rent suit by the rule of *res judicata*. **Upendra Kumar Chakravarthi v. Sham Lal Mondol**, 11 C.W.N. 1100 = 6 C.L.J. 715 = 34 C. 1020.

RIMPANI, C.J., and SHARFUDDIN, J.

References:—(a) 29 M. 529, *Diss.* ; 4 A.L.J. 397 R. (b) 22 B. 718, *F.*

- (122) *Arts. 175 (c), 178—When application for substitution of names to be made in appeals—See CIV. PRO. CODE, No. 209, 4 A.L.J. 397.*

- (123) *Art. 178—Execution sale set aside—Decree-holder's application for fresh sale, limitation for—Civ. Pro. Code, S. 315.*

S. 315 of the Code empowers the auction-purchaser to require re-payment, but does not impose upon the decree-holder the duty of tendering the money, as soon as the sale is set aside. The decree-holder is not bound to do anything, except pay on demand. The judgment-debtor's action in getting the sale set aside does not therefore injure the decree-holder, until he is compelled to refund the purchase-money to the purchaser, and, till then, he has no right to call upon the judgment-debtor to pay his debt a second time. Art. 178, Limitation Act, governs the decree-holder's application for a fresh sale, and time does not run, until he is compelled to refund the purchase-money to the purchaser. **Yenkata Appa Row v. Ayyanna**, 17 M.L.J. 194 = 30 M. 209.

WHITE, C.J., and MILLER, J.

References:—4 C. 415, 5 B. 29, 13 C. 155, *R.*

Limitation Act—(Continued).

(124) Art. 178—Fraud in decree and in execution proceedings—Suit to set aside proceedings—Limitation—See CIV. PRO. CODE, No. 74, 5 C.L.J. 328.

(125) Art. 178—Rule 859 of the High Court Rules—No period of limitation applies to proceedings under this rule—Practice—Recovery of solicitor's costs.

There is no specific provision in the Limitation Act, or anywhere else, fixing a period of time within which an application for enforcement of payment of costs by a solicitor against his client, by the summary method provided by Rule 859 of the High Court Rules, should be made. Art. 178 of the Limitation Act applies only to applications under the Civil Procedure Code, 1882. Solicitors can recover costs due to them by a client in different suits by one summons. It is not necessary to take out a separate summons for costs due in each suit. **Wadia, Gandhi and Co. v. Purshotum Shivji**, 9 Bom. L.R. 508.

DAVAR, J.

(125-a) Art. 178—See Nos. 18, 44, 90 and 122, *supra*.

(126) Sch. II, Arts. 178, 179—Application for execution—Mortgage decree—Mortgagee in possession—Accounts—Limitation.

By a mortgage decree passed in April, 1877, the mortgagees were directed to remain in possession, till the mortgage debt was paid off from the usufruct of the property. In 1885, there was presented by the mortgagors an application, in the execution department, for taking off an account and for redemption. An account was filed, but nothing more was done. The present application was made in 1903 for similar relief:

Held, (WOODROFFE, J., *dubitante*)—Either Art. 178 or Art. 179, of Sch. II of the Limitation Act, applied to the application, which was barred by limitation.

Held also—the proper remedy for the mortgagor would be by a regular suit. **Chandra Sekhar Sarkar v. Peary Mohun Makerjee**, 5 C.L.J. 289.

RAMPINI and WOODROFFE, JJ.

References:—24 A. 44, 25 M. 300, 16 B. 480, 23 B. 592, R.

(127) Arts. 178 & 179—Sale of immovable property under Revenue Recovery Act—Application by purchaser for delivery of possession—

Limitation Act—(Continued).

See ACT II OF 1864 (REVENUE RECOVERY, MADRAS), No. 3, 17 M.L.J. 441.

(128) Art. 179, Sch. II—Civ. Circulars, Rule 80—Decree—Execution—Application for execution—Application not accompanied by copy of the decree—Application made 'in accordance with law'—Construction of rule.

An application for execution of a decree, though not accompanied by a copy of the decree, as required by Rule 80 of the High Court Circulars (Civil), is an application 'in accordance with law,' within the meaning of article 179, Sch. II of the Act.

The proper view to take of Rule 80 is, not that it prescribes the essentials, which an application for execution must contain, and which are necessary to constitute the application itself an application in accordance with Law, but that it requires something further besides the application itself, an accompaniment extraneous to the application, as a condition precedent to further action by the Court executing the decree (a).

The Limitation Act, as an enactment of restrictive character, must be strictly construed (b). **Ramachandra Sadashiv v. Laxman Shadashiv**, 8 Bom. L.R. 892 = 31 B. 162.

BATTY and HEATON, JJ.

References:—(a) 5 Bom. L.R. 394, *not F.*, 28 M. 557, *F.* (b) 1 B. 19, *F.*

(129) Art. 179—Decree in redemption suit—Payment of mortgage money whether condition precedent to applications for executing decree.

Where a decree in a redemption suit directed the plaintiff to recover possession of the mortgaged property "on payment... of Rs. 865," and no time was fixed, within which the payment was to be made, the payment of the mortgage money is, no doubt, a condition precedent to the making of an order for the delivery of the property, but it is not a condition precedent to the making of an application for a conditional order. An application, therefore, for execution of the decree, without paying the amount, is "in accordance with law," within the meaning of Art. 179. **Syed Hussain Saib Rowthen v. Rajagopala Mudaliar**, 30 M. 28.

WHITE, C.J. and WALLIS, J.

Reference:—16 B. 480, *Appr.*

(130) Art. 179—in accordance with law—Step in aid of execution—application for personal decree where it was not necessary.

Limitation Act—(Continued).

A consent decree was passed on the 25th February, 1886. It not only provided for the sale of the mortgaged property, but was also in effect a personal decree as well. In 1898, the mortgaged property was sold. On the 14th of March 1901, application was made for execution of the decree, but it was struck off. Again on the 23rd of February, 1904, application was made for a decree under S. 90 of the transfer of Property Act. This application was dismissed, the Court holding that, inasmuch as the original decree provided also for personal payment by the judgment-debtors, no decree under S. 90 was necessary. The decree-holders then made the present application for execution of the decree. Judgment-debtors pleaded that it was time-barred. *Held*, that the intention of the decree-holders must be taken to have been to apply for the execution of their decree and the application might, with amendment, have been treated as an application for execution of the decree, instead of an application for a decree. *Held*, further, that the application of the 23rd of February, was an application or a step in aid of execution within the meaning of the Limitation Act. **Moti Lal v. Sukhdeo**, 4 A.L.J. 40 = A.W.N. (1907), 29.

*KNOX and RICHARDS, JJ.

(131) *Art. 179—Civil Procedure Code, S. 232—Execution of decree—Limitation.*

Held, that an application for execution made by a person, who claimed to be a transferee of the decree, but whose application under S. 232 of the Code of Civil Procedure to be certified as such transferee had been rejected, was not an application, which could save limitation within the meaning of article 179 of the second schedule to the Indian Limitation Act, 1877. **Intikhab Husain v. Rafi-un-nissa**, A.W.N. (1907), 39.

RICHARDS, J.

(132) *Art. 179—Defective application for execution—Prayer for issue of notice—Step-in-aid of execution.*

Where an application for execution, though defective in form, contains a prayer for a notice to be issued to the judgment-debtor under S. 248 of the Civ. Pro. Code, and the notice is accordingly issued, it is an application made in accordance with law and is a step-in-aid of execution within the meaning of Art. 179. **Shankar Lal v. Zorawar Singh**, 116 P.R. 1907.

RATTIGAN, J.

Limitation Act—(Continued).

References:—15 A. 84, 25 C. 594, 23 A. 162, 16 M. 142, 6 P.R. 1895, 17 C. 681, 23 C. 217, 13 B. 237, 22 B. 83, 19 B. 34, *It*.

(133) Sch.II, Art. 179—Whether application by benamidar is one made in accordance with law—See **EXECUTION OF DECREE**, No. 5, 10 O.C. 263.

(134) Art. 179—Application for execution by a transferee of decree whether "in accordance with law"—See **CIV. PRO. CODE**, No. 5, 2 M. L.T. 339.

(134-a) Art. 179—whether application by mortgagor who has obtained a decree for redemption, for possession of property, governed by Art. 179 of—See **MORTGAGE (REDEMPTION)**, No. 23, 4 L.B.R. 83.

(134-b) Art. 179—See Nos. 33, 126 and 127, *supra*.

(135) *Art. 179 (2)—Appeal by some of the defendants against portion of decree—Appeal dismissed—Limitation for executing remaining portion of decree—S. 230 (a), Civ. Pro. Code.*

A partition suit was filed against 9 defendants, on the allegation that two houses were joint and ancestral property of the parties, but the decree made a distinction among the defendants and granted relief to the plaintiffs in respect of the two houses, specifying the defendants from whom plaintiffs were to get their share of each house. Thus, there was only a single decree, though all the defendants were not interested in both the properties, in respect of which the decree was passed. Some of the defendants appealed against the decree in respect of house No. 1, which was, however, dismissed by the Appellate Court. The plaintiffs then applied for execution, in respect of the other house, more than three years after the date of the original decree, but within three years from the date of the appellate decree. One of the defendants, who was jointly interested in the second house, but had not joined in the above mentioned appeal, though he has been a party to all the proceedings, pleaded limitation, on the ground that the original decree still subsisted inasmuch as he has not appealed therefrom. *Held* that limitation runs, both under S. 230 (a) Civ. Pro. Code, and Art. 179 (2), Limitation Act, from the last order in appeal, and that Art. 179, cl. (2) applies to any such decree, against which an

Limitation Act.—(Continued).

appeal was preferred by any of the parties to the original suit, **Anwar Ali v. Isayat Ali**, 32 P.R. 1907.

CHATTERJI, J.

References:—22 B. 500, 25 C. 594, F; 13 A. 1 *Distd. and Disappr.*

(136) *Sch. II, Art. 179, Cl. (4)—Civ. Pro. Code, application under S. 232,—Application asking time to find out address of judgment-debtor—step in aid of execution.*

Gomti, the original decree-holder, transferred the decree to Pitam Singh who made an application for substitution of his name. Notice was issued on this application but could not be served on one of the judgment-debtors. An application for time was made and granted. More than 3 years after the date of the last application for execution but within 3 years of these applications, the present application was made for execution.

Held, that they were *bona fide* applications made with the intention of keeping the decree alive and the decree could not be executed without an application under S. 232, Civ. Pro. Code, being made. These applications were to take steps in aid of execution within the meaning of Art. 179, Cl. (4), Sch. II, Limitation Act. **Pitam Singh v. Tota Singh**, 4 A.L.J. 184=A.W.N. (1907) 74=29 A. 301.

KNOX and RICHARDS, JJ.

(137) *Art. 179, cl. (4)—Application for execution by legal representative of deceased decree-holder not brought on record—Application in accordance with law—Construction of decree.*

A decree provided that the plaintiff was not entitled to execute the decree till the hypothecation of one of the defendants was discharged by the plaintiff. On the death of the decree-holder, his widow made an application before discharging the defendant's hypothecation for execution of the decree.

Her name was not placed on the record as the legal representative of the decree-holder, nor did she apply in her petition to be placed on the record. *Held* that the application was one made according to law under Art. 179, cl. (4) of the second Schedule of the Limitation Act.

Held also, that the discharge of defendant's claim could not be treated as a condition precedent to the execution of the decree, but that the decree only made such discharge a con-

Limitation Act.—(Continued).

dition precedent to the recovery of the money from the other defendants (a).

An application made by the widow of a decree-holder as his legal representative for the execution of the decree is an application in accordance with law, although she had not been placed on the record, nor had she applied to be so placed. **Alagiriwamy Naidu v. Venkatachellapatti Iyer**, 17 M.L.J. 566.

BENSON and SANKARAN NAIR JJ.

References:—(a) 30 M. 28, R; (b) *Ref. Cases* 18 of 1880, 20 C. 755, 20 B. 76, 16 A. 26, R.

(138) *Art. 179 (4)—application for order absolute—not in accordance with Civil Rules of practice—Step in aid of execution—Transfer of property Act, S. 89.*

An application by the holder of a mortgage for an order absolute, under S. 89 of the Transfer of property Act, although defective in the statement of particulars and unverified, and, consequently returned as not being in accordance with the Civil Rules of practice, may be an application for execution in accordance with the law and a step in aid of execution sufficient to save limitation, if the defects are not calculated to prejudice the judgment-debtor or mislead the Court. **Ramayyan v. Kadir Bacha Sahib**, 17 M.L.J. 596.

WALLIS and MILLER, JJ.

References:—16 M. 143, 6 M. 250, 17 M. 76, F; 26 M. 780, 28 M. 557, R; 25 M. 244, *Expl.*

(139) *Art. 179, cl. (4)—Step in aid of execution—Application by decree-holder's representative to be recognised as decree-holder—See Civ. Pro. Code, No. 102 17 M.L.J. 475.*

(139-a) *Art. 179, cl. (4)—Application by transferee of decree to bring in defendant's representative on record—Step in aid of execution—See Civ. Pro. Code, No. 107, 17 M.L.J. 485.*

(139-b) *Art. 179, cl. (4)—Transfer of jurisdiction from Court passing decree to another Court—Application for transfer of decree to that Court made to Court passing decree—Step in aid of execution—See Civ. Pro. Code, No. 96, 17 M.L.J. 417.*

(140) *Art. 179, cl. (5)—Execution of decree or Order—"Date of issuing notice," meaning of—Civ. Pro. Code, S. 248.*

For the purposes of art. 179, cl. 5, the date of issuing a notice under S. 248 of the Code is, in the absence of express legislative provision to the contrary, the date of the actual issue of the

Limitation Act.—(Continued).

notice, and not the date of the order directing notice to issue. **Cheravath Parkum Thalungal Bappu v. Novoth Parkum Thalungal Kanaran**, 1 M.L.T. 395 = 16 M.L.J. 548 = 30 M. 30.

BODDAM and WALLIS, JJ.

References:—6 C.W.N. 656, 10 C.W.N. 303, F; 23 B. 35, R; 27 B. 622, 28 B. 416, A.W.N. (1881), 147, *Diss.*

(141) *Sch. II, Art. 179, cl. (6)*—Maintenance decree—Certain sum made payable per annum from date of plaint—"certain date"—See *RES JUDICATA*, No. 2, 17 M.L.J. 402.

(142) *Art. 179, Sch. II, Expln.*—Decree passed jointly—Application for execution against one of the judgment-debtors—Surety and judgment-debtor—Surety under S. 253 of the *Civ. Pro. Code*—Surety and judgment-debtors are not joint judgment-debtors.

Before the passing of a decree, a surety became liable for the due performance of part of the decree. The decree was passed in January, 1893. No *darkhasts* were preferred against the surety till 20th June, 1902, though application for execution was made in time against the judgment-debtor alone. On the question whether the *darkhast* against the surety was barred, held, that the *darkhast* was time barred, as the decree-holder was not entitled to take advantage of the previous application for execution of the decree, which he made against the judgment-debtor.

The explanation to article 179 refers to the decree, which is "passed jointly" against more persons than one, and does not refer to a decree where joint liability may be deduced by combining the surety bond and the provisions of S. 253 with the decree in dispute. **Narayan Ganpathbat v. Timmaya Subhaya**, 8 Bom. L.R. 897 = 31 B. 50.

ASTON and HEATON, JJ.

Reference:—23 B. 478, R.

(143) *Art. 179, Expl. I, Para. 2*—Joint decree for costs against three defendants and for mesne profits against two of them—Execution of decree for mesne profits, effect of in keeping alive right to execute for costs.

Where there is a joint decree for costs against three defendants and for mesne profits against two of them, and an application for execution against the two as regards mesne profits was put in within 3 years prior to the application in execution for costs against the third defendant, held that Art. 179, Expl. I, Para. 2, which

Limitation Act.—(Concluded).

must be read literally, applied to the case, and the right to execute the decree for costs against the third defendant is not barred by limitation. **Subramaniya Chettiyar v. Alagappa Chettiyar**, 2 M.L.T. 189 = 30 M. 268.

WHITE, C.J., and MILLER, J.

Reference:—26 M. 91, R.

(144) *Sch. II, Art. 180*—revivor—order relates back to the date of application—Release of one judgment-debtor—Execution against others—Contribution.

A decree was passed by the Calcutta High Court on 15th of May, 1893. On 2nd May, 1905, the decree-holders applied and got it transferred to Agra by an order of 21st July, 1905. On 9th December, 1905, an application was made for execution at Agra. Held, that, the application for transfer having been made within 12 years of the decree, the order passed on it related back to the date of the application and revived the decree within the meaning of Art. 180 of the Act, *Sch. II*.

Where the decree-holder receives a payment from one of the judgment-debtors of a joint-decree and strikes out his name from the application for execution, the decree can be executed against the other judgment-debtors, whose right of contribution against the aforesaid judgment-debtor is not lost. **Beni Madhov v. Shiva Narain**, 4 A.L.J. 405 = A.W.N. (1907) 164.

FINOX and RICHARDS, JJ.

Limitation Regulation (Travancore).

(0) *Art. 8*—Sale, by inferior Court, of property under attachment by superior Court—S. 324, *Civil Procedure Code* (Travancore), obstruction under—Regular suit.

A sale by the inferior Court, during the pendency of an attachment by the superior Court, is not absolutely void as made without jurisdiction; but is only voidable under certain circumstances. Notice of the attachment by the superior Court is a circumstance, which would go to invalidate the sale by the inferior Court. But the sale by the inferior Court not being *ipso facto* null and void, but only voidable, it will become indefeasible by lapse of time, if it is not cancelled within one year under Art. 8 of the Regulation.

It is open to the person dispossessed to file a suit for relief, without resorting to the summary procedure provided in S. 324 of the Code; and the fact that he put in a petition in answer to the auction-purchaser's complaint

Limitation Regulation (Travancore).—(Contd).

about obstruction does not prevent him from filing his suit at once. **Ithakku Pylo v. Yarki Philipose**, 22 T.L.R. 147.

PADMANABHA IYER and RAMACHANDRA ROW, JJ.

Reference:—17 T.L.R. 101, *Expl. and F.*

- (1) *Limitation Regulation, Arts. 12 and 147 and residuary article—Effect of Sirkar's assuming management of a religious institution—Suit by tenant for excess of rent paid under protest—What is a sufficient protest—Definition of 'rent' and 'revenue'—Whether rent of lands of religious institutions is public revenue—Assumption whether confiscation—Revenue Recovery Regulation (I of 1068), Ss. 1 and 59—Religious Endowment Regulation (III of 1079), S. 13 or 15—Sree Pandara Vagay.*

The plaint land, held by the first defendant on Venpattom from a Devaswam, and assumed by the Sirkar about the year 1076, was claimed to have been held by him under a Pathivu of 1020, and mortgaged to the plaintiff, who was to pay a rent of 51 Parahs and odd to the Devaswam, as fixed in the Pathivu. The Sirkar, having found, from some Devaswam accounts, that 76 Parahs and odd were due, demanded payment of the difference between the past and the new rates for a period of 11 years ending with 1076, and, on his refusal to pay it, attached his moveables, under the Revenue Recovery Regulation (I of 1068). In the plaintiff's suit, instituted on the 7th Karkadogam, to recover the excess paid by him under protest, on the 27th Meenom 1077, to the Sirkar, the Sirkar, *inter alia*, contended that the suit, having been instituted more than a year after the payment, was barred under Art. 12 of the Limitation Regulation; *held*,

that Art. 12 did not apply, and that the suit was within time;

that it was doubtful whether a temple, whose management had been assumed before the date of Reg. II of 1079, could get the benefit of S. 13 (or 15), of the Regulation, even if the Dewan directed that the rents of any endowment, falling within the Regulation, might be collected as arrears of revenue.

Per Sadasiva Aiyar, C. J.—Art. 47 of the Limitation Regulation was the most appropriate article to apply.

Limitation Regulation (Travancore).—(Contd).

Where the defendant has received money which, in justice and equity, belongs to the plaintiff, under circumstances which render the receipt of it a receipt by the defendant for the use of the plaintiff, the plaintiff is entitled to recover it, a principle not effected by S. 72 of the Contract Act (a). The mere fact that the payment was made with a denial of the defendants' right to the money paid, should be treated as a formal and sufficient protest (b).

'Rent' is not the same as 'Revenue'. 'Revenue' usually indicates money intended for appropriation towards national and public expenses as opposed to expenses of private or sectarian endowments and estates.

Unless the state mixes up the rents of the lands of a temple with the general revenue, so as to make these rents capable of appropriation for other general purposes, and so as to treat sums realised from other heads of the revenue as available for the temple expenses, rents of temple lands, though collected by the State as manager, cannot be said to form part of the public revenue.

Per Ramachandra Row, J.—The residuary article which provides 6 years, governs this case.

The term Sree Pandara Vagay refers only to Sree Padmanabhaswamy's temple lands.

When the Sirkar assumes the management of a temple, the temple properties do not become Government property, and the assumption is an administrative act founded on the position of Government as *Parens patriae* (c).

The assumption by Government of the management of Devaswam is not a confiscation or usurpation and does not vest the properties attached to these institutions in the Sirkar (d). **The Dewan of Travancore v. Krishnan Easwaran**, 22 T.L.R. 54.

SADASIVA AIYAR, C.J., and RAMACHANDARA ROW, J.

References:—(a) 25 M. 548, R; (b) 5 W.R. 47, R; (c) 5 T.L.R. 1, R; (d) 15 T.L.R. 185, R. 18 A. 302, 11 M. 317, 22 M. 100, 15 C. 656, R.

- (2) *Art. 47—Effect of vague and general allegations of fraud—Suit to recover share of compensation money—Limitation.*

A suit brought by a person to recover his share of the compensation money drawn by the defendant from the sirkar, more than 3½ years after the date of cause of action, is barred under Art. 47.

Limitation Regulation (Travancore).—(Contd.)

General allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud, of which any Court ought to take notice (a). **Masonam Subbien v. Yalandi Yadhyyar**, 22 T.L.R. 148.

SADASIVA IYER, C.J., and GOVINDA PILLAI, J.

References :—(a) 15 C. 533, 18 B. 144, R.

(2-a) Art. 96—Suit for purchase-money—Alienation—deed signed by vendor only—Contract in writing registered—See LIMITATION REGULATION, No. 3, 22 T.L.R. 200.

(2-b) Arts. 101, 105 and 121—Application of—Suit for possession against Mahomedan co-sharers.

Art. 105 (= Art. 127, Indian Limitation Act) was not intended to apply to persons not following the Mitakshara or Malabar Hindu joint family system. Art. 101 (= Art. 123 of the British Code) was also not intended to be applied to cases, where the estate of a deceased is not represented by an executor or administrator, who is bound to distribute the estate, and the article has nothing to do with joint possession or cessation of such possession. Art. 121 (= Art. 144 of the British Code) applies to the claim of a sharer in a Mahomedan's estate for recovery of such share, as all the heirs become co-owners of the deceased owner's properties at the moment of his death. **Yava Kunju Abdul kunju v. Atchuthan Aiyappan**, 22 T.L.R. 1907 (F.B.).

SADASIVA AIYAR, C. J., PADMANABHA AIYAR and RAMACHANDRA ROW, JJ.

References :—16 M. 61, F; 11 T.L.R. 125, 13 T.L.R. 163, 15 T.L.R. 83, *overruled*.

(2-c) Art. 108—Suit for Jenmi Bhogar—See JENMI KUDIYAN REGULATION, No. 1, 22 T. L. R. 176.

(3) Arts. 109, 123—Suit by otti or usufructuary mortgagee who fails to get possession of the mortgaged property—Limitation.

Where a mortgagee under an otti (or usufructuary mortgage) deed fails to get possession of the mortgaged property, a suit by the mortgagee to recover the mortgage amount by sale of the property, is governed by Art. 109 and not by Art. 123 of the Limitation Regulation. **Raman Raman v. Raman Velayudhan**, 22 T.L.R. 213 (F.B.).

SADASIVA IYER, C.J., GOVINDA PILLAI, and PADMANABHA IYAR, JJ.

Limitation Regulation (Travancore).—(Contd.)

(4) Art. 121—Improper alienation of Tarwad property by Karnavan of a Tarwad—Suit for recovery by some junior members—Subsequent suit by succeeding Karnavan—Cause of action—Lunatic—Res Judicata.

A Karnavan alienated Tarwad property in favour of his son. Such alienation not being binding on the other members of the Tarwad, some of the junior members of that Tarwad sued for the cancellation of the sale deed and to recover possession of the property. They obtained a decree setting aside the sale; but, according to the current of decisions prevailing at the time, the prayer for recovery of possession was refused.

A subsequent suit by a succeeding Karnavan who was not a party to the prior suit, for the recovery of possession of that property, was held to be governed by Art. 121 of the Travancore Limitation Regulation, and that the cause of action arose from the date of the decree cancelling the sale (a).—Govinda Pillai, J., dissenting.

Held, also, that, as the decree in the previous suit was passed only against some of the junior members of the Tarwad, it did not operate as *res judicata* against the whole Tarwad, (i.e.), against its other junior members or against the Karnavan suing as representative of the Tarwad. **Kanakku Mathevan Ramkrishnan v. Ramkrishnan Mathevan**, 22 T.L.R. 157.

SADASIVA IYER, C.J., GOVINDA PILLAI and PADMANABHA IYER, JJ.

References :—16 T.L.R. 118, F. 12 T.L.R. 211 and 20 T.L.R. 252, *overruled*. 7 T.L.R. 137; 5 T.L.R. 19; 11 T.L.R. 92; 17 T.L.R. 18; and A.S. Nos. 88 and 103 of 1077, *Referred to and followed*.

(4-a) Art. 147—Application to bring in the legal representative of a deceased defendant—Limitation—See CIV. PRO. CODE (TRAVANCORE), No. 3, 22 T.L.R. 266.

(5) Art. 153 (4)—Transfer of decree to another Court for execution—Application to the Court which passed the decree to re-call it—Step in aid of execution—Difference between the Travancore Regulation and the Indian Limitation Act.

The Travancore Limitation Regulation is much more liberal to the decree-creditor than the British Indian Act.

The duty of the Court which passed the decree to execute it is not extinguished, simply

Limitation Regulation (Travancore).—(Concluded).

because it has transferred a copy of the decree for execution to another Court, and there is nothing to prevent both Courts executing the decree, provided arrangements are made to protect the judgment-debtor from being obliged to pay twice over.

An application to the Court which passed a decree to recall the case sent to another Court for execution is a step in aid of execution within the meaning of Art. 153 (4) of the Travancore Regulation. **Padmanabhen Swaminathen v. Saja Mytheen Kunju**, 22 T.L.R. 83.

SADASIWA AIYAR, C.J. and RAMACHANDRA ROW, J.

Lis pendens.

- (1) *Doctrine of—Application to involuntary sales—Sale for arrears of revenue pending proceedings in mortgage suit—suit for recovery of possession by lessor against third party, when maintainable.*

The doctrine of *lis pendens* applies to transfers of immoveable property *in invitum* (a).

A suit for recovery of possession by a lessor is maintainable, if the lessee is a party and does not object. **Raj Kishore Awasthi v. Jadu Nath Basak**, 11 C.W.N. 828.

MACLEAN, C.J., and MITRA, J.

References:—(a) 15 C. 756, 15 C. 546 and 21 W.R. 949, *relied on*.

- (2) *Basis of doctrine of—See TRANSFER OF PROPERTY ACT, No. 16, 11 C.W.N. 561.*

- (3) *Alienation after institution of suit but before service of summons—See TRANSFER OF PROPERTY ACT, No. 17, 9 Bom.L.R. 530.*

- (4) *Rule of—Reason of the rule—Effect of—See TRANSFER OF PROPERTY ACT, No. 18, 9 Bom. L.R. 1173.*

Litigation.

- (1) *Agreement to provide funds for—Specific performance, suit for recovery of property based on such an agreement really a suit for—Extortionate and unconscionable terms of such an agreement, not to be enforced—Limitation Act, 1877, sch. II, art. 113—Vested right—Refusal to perform one's part of agreement.*

One *I*, being desirous of recovering a large property, to which he had become entitled as the nearest collateral of one *D*, entered into an agreement in 1885, with the father of plaintiffs 1 and 2 and other persons, according to which

Litigation.—(Concluded).

they were to find the necessary funds for the litigation, and after the property was recovered, *I* was to take 5 annas and the rest was to be divided in specific shares between the other persons including the father of plaintiffs 1 and 2. A suit for the recovery of two villages was first instituted. During the pendency of that suit, *I* died leaving a son *B*, who in 1886 agreed to take only 3 annas, and the shares of the plaintiff's father and another person were increased by one anna each. *B* was substituted in *I*'s place and the suit was eventually decreed and all obtained possession according to the shares agreed to. Subsequently, *B* alone brought a suit for the recovery of another portion of the property and, ignoring the agreements of 1885 and 1886, sold a ten annas share in the remaining property to one *S*. The father of plaintiffs 1 and 2 applied in 1890 to be made a party, but his application was rejected. That suit also was decreed in 1894 and other suits were brought up to 1898, when practically the whole of the property had been recovered. After the application of plaintiffs' father was rejected in 1890, nothing was done either by him or by the plaintiffs till 1905, when the present suit to recover plaintiffs' share in the property decreed was instituted.

Held, that, in any view of the case, the plaintiffs' suit was liable to be dismissed. If, by the agreements of 1886 and 1889, no title vested in the plaintiffs, the suit should be treated as one for specific performance and, as such, was barred by limitation under Art. 113 of Sch. II of the limitation Act. If title passed, then the plaintiffs could not recover on the strength of the agreement, as their father had refused to carry out his part of the agreement.

Held also, after reviewing all the circumstances of the case, that the agreements were extortionate and unconscionable and therefore could not be enforced. **Kuar Ram Ghulam Singh v. Kuar Partab Singh**, 10 O.C. 173.

CHAMIER and SANDERS, A.J.Cs.

Local Boards Act.

See Act V of 1884 (MADRAS.)

Lower Burma Courts Act, 1900.

- (1) S. 8—Law applicable to Insolvency proceedings in Rangoon—Appeal from order dismissing petition of insolvency—Court's power to grant *interim* order for appellant's protection from arrest pending appeal—See **INSOLVENT**, No. 2, 3 L.B.R. 241.

Lower Burma Town and Village Lands Act.

See ACT IV of 1898.

Lunatic.

(1) A contract by a—is void—See CONTRACT ACT, No. 8, 17 M.L.J. 78.

Magistrate.

(1) Movable property delivered to defendant under erroneous order of,—Suit to recover same by true owner—Limitation—See LIMITATION ACT, No. 65, 1 M.L.T. 397=16 M.L.J. 541=30 M. 12.

Mahomedan Law.

1—GENERAL.

2—ACKNOWLEDGMENT.

3—ALIENATION.

4—DOWER.

5—ENDOWMENT.

6—FAMILY ARRANGEMENT.

7—GIFT.

8—GUARDIANSHIP.

9—INHERITANCE.

10—MARRIAGE.

11—MINORS.

12—RESTITUTION OF CONJUGAL RIGHTS.

13—SALE.

14—SUCCESSION.

15—WAKF.

16—WILL.

1.—(General).

(1) *Divorce—Talak—Marz-ul-maut—Death-illness.*

The tests to determine whether illness is to be regarded as death-bed illness (*marz-ul-maut*) under Mahomedan Law, are :

(1) Proximate danger of death, so that there is a preponderance of *khauf* or apprehension that, at the given time, death must be more probable than life.

(2) There must be some degree of subjective apprehension of death in the mind of the sick person.

(3) There must be external indicia, chief among which would be the inability to attend to ordinary avocations. **Rashid Karmall v. Sherbanoo**, 9 Bom. L.R. 252=31 B. 264.

BATTY and PRATT, JJ.

References :—30 B. 537=8 Bom. L.R. 24, 31 C. 319.

Mahomedan Law.—(Continued).**1.—(General).—(Concluded).**

(2) *Spes successionis—Creation of life interest—A vested remainder—Shias.*

The creation of life-interest is allowed among Shias. During the period of the life-interest, the deferred interest can be dealt with by way of sale, gift, or otherwise, provided there is no interference with the particular estate; and the purchaser or donee could deal with the interest so acquired by him. A Mahomedan can create a definite interest like the one known to English Law as vested remainder; and such a remainder, though liable to be displaced, is not a mere expectancy in succession by survivorship or other merely contingent or possible right or interest, but an interest that can be attached and sold (*a*). **Banoo Begum v. Mir Abed Ali**, 9 Bom. L.R. 1152.

JENKINS, C.J., and HEATON, J.

Reference ;—(*a*) 17 I.A. 201, F.

2.—(Acknowledgment.)

(1) *Imamiya School—Legitimacy—Acknowledgment, effect of.*

Under the Imamiya School of Mahomedan Law mere acknowledgment is not sufficient to legitimatise a person, who is otherwise known to be illegitimate. Acknowledgment can be of use, only where the parentage is unknown, and no one disputes the heirship. **Jigri Begum v. Nujiban**, 5 C.L.J. 664.

MITRA and HOLMWOOD, JJ.

3.—(Alienation.)

(1) *Alienation of minor's property by mother—Guardian, legal and de facto—Minor, benefit of—Justice, equity and good conscience—Second appeal, questions of fact and law—*

Per RAMPINI, J.—Whether a certain sale was for the benefit of minors or not is a question of fact, and the finding of the District Judge is conclusive on this point.

Per WOODROFFE, J.—The question can be dealt with in second appeal. The facts must be accepted as found, but the question whether assuming the facts to be true, the sale did or did not bind the minors is another matter, which can be dealt with.

Per Curian.—In the present case, the sales were unquestionably for legal necessity and for the benefit of the minors.

Mahomedan Law.—(Continued).**—3.—Alienation.**—(Concluded).

Although, under the Mahomedan Law, a mother is not the legal guardian of the property of her minor children, yet when she, as in the present case as the *de facto* guardian, transfers such property actually for the maintenance of the minors, and for other necessary purposes, manifestly to the benefit of the children, such transfer is binding on the minors.

Per WOODROFFE, J.;—Even if there was no such rule in Mahomedan Law, it would be enforceable as one of justice, equity and good conscience. The law relating to guardians is one which exists for the benefit of minors, and it would be inconsistent and unjust to set up that law to defeat a transaction which, in every respect, fulfils its object. **Mafuzzul Hosain v. Basid Sheikh**, 4 C.L.J. 485=11 C.W.N. 71=34 C. 36.

RAMPINI and WOODROFFE, JJ.

References:—(a) 1 A. 533 and 26 A. 22, *F.* 17 W.R. 239, *R.* 29 C. 473, 11 C. 417 and 20 B. 116, *Distgd.*

(2) Application of, to Sheikh Ansaries of basti Danishmandan, Jallandar District—See CUSTOMS (PUNJAB), No. 1, 1 P.R. (1907).

—4.—(Dower).

(1) *Claim for dower is a debt against husband's estate—widow in possession of the estate is in the position of mortgagee—Decree for the full amount of the dower.*

Under Mahomedan Law, a widow's claim for dower is a debt against the husband's estate. But where the widow obtains actual possession of the estate she is a mortgagee of her husband, under a claim to hold it as one of the heirs, and, for her dower, she is entitled to retain possession, until her dower is satisfied, the liability to account to those entitled to the property being subject to the claim for the profits received. Her possession cannot be disturbed, until her dower debt has been satisfied and, when lawfully in possession of her husband's estate, she occupies a position analogous to that of a mortgagee (a).

A Mahomedan widow is entitled to the whole of the dower, which her deceased husband had, on marriage, agreed to give her, whatever it might amount to, or whether or not her husband was comparatively poor when he married, or had not left assets sufficient to pay the dower debt (b).

Mahomedan Law.—(Continued).**—4.—(Dower).**—(Continued).

Where a Mahomedan had agreed to give a dower of 80,000 Ashrutees to his wife, and after his death, his widow claimed the amount, the Court passed a decree in her favour for the full amount. **Banoo Begum v. Mir Aun Ali**, 9 Bom. L.R. 188.

RUSSELL, J.

References:—(a) 6 B.L.R. 54, 14 M.I.A. 377, 7 A. 353, *followed.* (b) 2 A. 573 (**F.B.**), *followed.* 28 B. 666, 21 C. 135, 4 A. 17, *R.*

(2) *Oudh Laws Act, S. 5—Suit for dower—Dower debt, principle to be followed in determining—Wasika and amanati notes, income derived from.*

Held, that in determining the amount of dower debt which the husband is liable to pay under S. 5 of the Oudh Laws Act, the income of the husband from *Wasika* and *amanati* notes should be taken into consideration. **Saiyad Mohammed Raza Khan and others v. Nawab Musharraf Mahal Saheba**, 10 O. C. 241.

CHAMBER, J. C. and SANDERS, A.J.C.

(3) *Dower, deferred—Cause of action—Promise by two or more persons and promise to two or more persons—Contract, joint or several, or joint and several, question of construction—Wife's heirs—Nature of interest—Suit for dower, necessary party to—Non-joinder of parties—Pro-forma defendant—No relief claimed—Limitation Act (XV of 1877), S. 22—Limitation arises between whom.*

Where the dower was a deferred dower, in other words, was payable only upon dissolution of marriage, either by divorce or by the death of one of the contracting parties, and where there was no dower deed executed, there was an implied agreement by the husband to pay to the heirs of his deceased wife the amount of the dower debt. Until her death, no cause of action arises, and her death gives rise to a cause of action to her heirs and not to her. The interest which the heirs have in the dower is not joint but different, and each, on the basis of the facts which constitute him an heir, has distinct title on which his cause of action is based. The title of all is not common (a).

All persons who claim to be entitled as heirs to share in the dower, are necessary parties to the suit together with the husband.

On the 4th September, 1908, one of the heirs of the wife instituted a suit to recover a share

Mahomedan Law.—(Continued).———**4.**—(Dower).—(Continued).

of the wife's dower and joined as parties defendants all the persons, who were the heirs of the wife at the time of her death excepting one M. One of the objections of the defendants was that the suit was defective inasmuch as M had not been joined as a party defendant. During the pendency of the suit in the Court of first instance, the plaintiff died, leaving as heirs his step brother and M. Of these, the former applied to be substituted on the record as plaintiff; as the latter did not join as co-plaintiff, she was brought on the record on the 3rd May, 1904, which was more than three years after the death of the wife, and was made a *pro-forma* defendant;

Held, that the suit as against M was not commenced until the 3rd May, 1904. The suit was instituted in time so far as the husband was concerned; as no relief was claimed against M the suit was not barred as against the husband and S. 22. of the Limitation Act had no application (b).

Per Brett, J.—The fact of M being brought on the record as a defendant is not sufficient to save limitation if it were decided that for the purposes of the suit it was necessary that she should have been brought on the record as a party in her personal capacity within three years from the date of the wife's death.

Limitation merely bars the remedy by suit, and the only parties in a suit between whom question of limitation can possibly arise are those who seek relief and those against whom relief is sought (c).

Per Mookerjee, J.—A promise by two or more persons to perform an act is a promise that they or some or one of them will perform it; but a promise to two or more persons to perform an act is not a promise to them or some or one of them but a promise to them all, to perform it. In the former case, the entire promise may be performed by one. In the latter, the entire promise cannot be enforced by one.

A right may belong to two or more individuals severally but not to two or more jointly and severally; but it may belong to two or more jointly.

The question whether a contract is joint or several, or joint and several, is a question of construction, that is, a question of the intention of the parties to the contract. If it is the intention of the parties, to be determined from the expression of their will or from the nature

Mahomedan Law.—(Continued).———**4.**—(Dower).—(Concluded).

of the obligation itself, that the obligation is to be indivisible, there is a joint right which is vested in several persons and which must be enforced by them jointly. One of the most important characteristics of a joint right, strictly so called, is that, upon the death of one of the persons in whom the right is vested, the whole right devolves upon the survivor to the exclusion of representatives of the deceased.

Mohamed Ishaq v. Sheikh Akramul Huq, 6 C.L.J. 558 = 12 C.W.N. 84.

BRETT and MOOKERJEE, JJ.

References:—(a) 25 M. 26; 6 C. 815 = 8 C.L.R. 457; 14 C. 791 D. (b) 27 C. 493, R & D. (c) 27 C. 493, *relied on*.

- (4) *Restitution of conjugal rights, decree for, subject to payment of dower—Dower not paid but demanded.*

Held, that, in a suit by a husband for restitution of conjugal rights, it is open to the wife, defendant, to demand her dower, although there has been previously a consummation of marriage, and the Court is competent to pass a conditional decree in favour of the husband, subject to his paying the amount due to the defendant (a). **Nawab Wazir Jahan Begam v. Nawab Halder Raza Khan**, 10 O.C. 11.

WELLS, J.C.

References:—8 A. 149 and 11 M. 327, *not F.* Sel. case No. 57, *followed*.

- (5) Widow's right to hold property till dower debt is paid—See ACT VI OF 1876 (LAND REGISTRATION, BENGAL), No. 1, 12 C.W.N. 16.

- (6) Rights of widow in possession in lieu of dower—See MAHOMEDAN LAW (SUCCESSION), No. 3, A.W.N. (1907), 221.

———**5.**—(Endowment).

- (1) *Shia—trustee—woman—Non-Mahomedan—less zealous Mahomedan—appointment of—Valid—no provision by settlor about appointment of lineal descendants—whether Courts could appoint an outsider—Discretion.*

There is no legal prohibition against a woman holding a *mutwalliship*, when the trust, by its nature, involves no spiritual duties, such as a woman could not properly discharge in person or by deputy.

One who is not a Mahomedan, and a *fortior* one who is so, but who follows a sect not ortho-

Mahomedan Law.—(Continued).

——5.—(Endowment).—(Concluded).

dox according to the standard of the settlor, is not disqualified by law for the post of a *mut-walli*.

The authorities fall far short of establishing the right of lineal descendants of the founder of the endowment, in which that founder has not prescribed any line of devolution.

The Courts can exercise a discretion in the selection of a trustee. When therefore in exercising such a discretion, they took into consideration, the nature of the duties imposed upon the trustee, the fact that by reason of her sex the appellant would not be able to discharge many of the duties personally, and the circumstance that she was a *Tabee*, and as such, might take a less zealous interest in carrying on the religious observances of the Shia School; and so refused to appoint the appellant a trustee, *held* that their discretion was sound. **Shahar Banoo v. Agha Mahomed Jaffer Bindaneem**, 4 A.L.J. 30 (P.C.) = 34 C. 118 = 11 C.W.N. 297 = 9 Bom. L. R. 85 = 5 C.L.J. 134 = 2 M.L.T. 49 = 17 M.L.J. 52 = 4 L.B.R. 66.

LORD DAVEY, LORD ROBERTSON, SIR ANDREW SCOBLE AND SIR ARTHUR WILSON.

——6.—(Family Arrangement).

(1) The plaintiff and the defendant, the former being the mother-in-law of the latter, passed a document whereby they relinquished their shares in certain property in favour of the two sons of the defendant.

Held, that the transaction was not a mere voluntary settlement, but was supported by valuable consideration, because the relinquishment by one was consideration for relinquishment by the other (a). **Ashidbai v. Abdulla Haji Mahomed**, 8 Bom. L.R. 652 = 31 B. 271.

CHANDAVARKAR, J.

References:—(a) 29 B. 333 = 7 Bom. L.R. 477, F.

-7.—(Gift).

(2) *Residence of donor in property given away—Validity of gift.*

Although the donor's possession of property given away, after the alleged gift, would be evidence that the gift was incomplete, it cannot be said that such possession would be a ground for invalidating the gift, if its truth is established and the transfer of possession is made out by sufficient evidence. Where the gift is evidenced by a petition presented to the Revenue

Mahomedan Law.—(Continued).

——7.—(Gift).—(Continued).

authorities by the donor and the donee, for the purpose of effecting a mutation of names, and it is not denied that exclusive possession of portion of the property passed to the donee, the subsequent residence of the donor (mother) with the donee (her daughter) is explained by the relationship of the parties, and it is not inconsistent with the view that possession of the whole property actually passed. **Kandath Veetil Bana v. Mussallam Veetil Pakru Kutti**, 2 M.L.T. 180 = 30 M. 305.

SUBRAHMANIA AIYAR AND MILLER, J.J.

References:—28 A. 147, *approved*; 19 M. 343, *explained*.

(2) *Mushaa, doctrine of—applicability—share in companies and freehold property.*

The doctrine of *mushaa* does not apply to shares in companies and freehold property in a great commercial town.

Where a Mahomedan trader in Rangoon made a gift of certain shares and other valuable freehold properties, in favour of his wife and minor children, *held*, that the gift was not invalid (a). **Ibrahim Goolam Ariff v. Saiboo**, 4 A.L.J. 572 (P.C.) = 11 C.W.N. 973 = 9 Bom. L.R. 872 = 17 M.L.J. 408 = 6 C.L.J. 695.

LORD ROBERTSON, LORD COLLINS AND SIR ARTHUR WILSON.

Reference:—16 I.A. 207 = 11 A. 460, *li*.

(3) *Death bed gift—Presumption of marriage—Continual co-habitation as husband and wife.*—

Where a Muhammadan, aged eighty, made a gift, three days prior to his death, while he was actually ill, *held* that the gift was a death-bed gift, under Muhammadan Law, and was, therefore, invalid.

Continual co-habitation as husband and wife raises, according to Muhammadan Law, a presumption of marriage. **Ahmed Bukhsh v. Husain Bibi**, 135 P.R. 1907.

CLERK, C.J.

(4) *Registered instrument of gift by Mahomedans—Applicability of Mahomedan Law—Necessity for delivery of possession.*

The Mahomedan Law is applicable to gifts between Mahomedans, even when effected by registered instrument (a).

It must, however, be borne in mind that the task of discovering and applying the rules of

Mahomedan Law.—(Continued).

——7.—(Gift).—(Concluded).

Mahomedan Law to the circumstances of this country, is often one of great difficulty (b) and that, in choosing between conflicting authorities, the principle of justice, equity and good conscience must be regarded (c).

It is incumbent on a party claiming, under a gift by a Mahomedan, to show very clearly that the requirements of the Mahomedan Law have been met, and, consequently, if he relies on a gift without consideration, to show that there has been delivery of the thing given, so far as it is capable of delivery (d).

Quere :—Whether the fact that the donor of a house continued to live in it, would, under Mahomedan Law, invalidate the gift (e). **Yahazulla Sahib v. Boyaspati Nagayya**, 17 M.L.J. 562=30 M. 519.

WALLIS and MILLER, JJ.

References :—(a) 24 M. 513, *Diss*; 19 M. 343, 13 M. 46, 6 M.H.C.R. 356, 15 C. 684 (P.C.), 7 A. 775, 11 B. 517, 22 B. 682, *R*; (b) 10 C. 112, *R*; (c) 16 I.A. 205 (215)=11 A. 416 (P.C.) and 6 Bom. L.R. 983, *R*; (d) 33 I.A. 68 (75) (P.C.), *R*; (e) 19 M. 343, 9 B. 146, 28 A. 147, *R*.

(5) Actual delivery of possession not necessary—See *GIFT*, No. 1, U.B.R. (1907), *Buddhist Law—GIFT*, 1.

——8.—(Guardianship).

(1) *Guardianship—Majority Act, 1875.*

Held, that in matters of contract, a Mahomedan boy or girl does not attain majority, until the completion of the age of 18 years or 21 years, as the case may be, and the boy or girl is, till the completion of such age, deemed to be under the guardianship of the person, who would be entitled to his or her guardianship under the Mahomedan Law. **Babu Sidh Gopal v. Mohammad Nazir Ahmad**, 10 O.C.1.

CHAMBER and EVANS, J. CS.

(2) *Act VIII of 1890 (Guardians and Wards)*, S. 10—*Guardians and minor—Paternal uncle or mother.*

The paternal uncle has no legal right under the Muhammadan law to the guardianship of the property of his minor nephews and nieces in the life-time of their mother. **Alimullah Khan v. Abadi Begam**, A.W.N. (1906), 256=29 A. 10.

BANERJI and ATKMAN, JJ.

Reference :—6 W.R.M.R. 125, *R*.

Mahomedan Law.—(Continued).

——9.—(Inheritance).

(1) Bilochis of Dera Gazi Khan follow custom and not Mahomedan Law—See *CUSTOMS (PUNJAB)*, No. 39, 119 P.R. 1907.

(2) Husband's share in wife's property—See *GIFT*, No. 1, U.B.R. (1907), *Buddhist Law—Gift*, 1.

——10.—(Marriage).

(1) *Husband and wife—Restitution of conjugal rights—Excommunication from caste—The husband must get re-admission into the caste, before he can compel his wife to live with him—Mussalman Kharwas—Status of the parties as members of a community.*

In a suit by the husband, who is excommunicated from his caste, for the restitution of conjugal rights against his wife, it is open to the latter to require that he should get himself re-admitted into the caste, to which the parties belonged at the time of marriage, before she is compelled by the Court to go and live with him as his wife.

This principle applies to the Mussalman Kharwa community of Broach. **Bai Jina v. Jina Kalia Kharwa**, 9 Bom. L.R. 451=31 B. 366.

CHANDAVARKAR and PRATT, JJ.

(2) Suit for restitution of conjugal rights—Attack by the husband on the wife's character—Cruelty—Defences open to the wife—See *MAHOMEDAN LAW (RESTITUTION OF CONJUGAL RIGHTS)*, No. 1, 4 A.L.J. 60.

(3) Restitution of conjugal rights, suit for—Limitation—See *LIMITATION ACT*, No. 43, 34 C. 79.

(4) Continual co-habitation—Presumption of marriage—See *MAHOMEDAN LAW (GIFT)*, No. 3, 135 P.R. 1907.

——11.—(Minors).

(1) Arrangement by brothers on behalf of minor—Repudiation by next friend—Restoration of advantage—See *MINOR*, No. 1, 91 P.R. 1907.

(2) Age of Minority, among Muhammadans—Applicability of Muhammadan Law—See *ACT IX OF 1875 (MAJORITY)*, No. 1, 10 O.C. 247.

——12.—(Restitution of Conjugal Rights).

(1) *Suit for restitution of conjugal rights—attack by the husband on the wife's character—Cruelty—Defences open to the wife.*

Mahomedan Law.—(Continued).**—12.—Restitution of Conjugal Rights.—**
—(Continued).

In a suit for restitution of conjugal rights by a Mahomedan, a wife may defend the suit on other grounds than actual violence of such a character as to endanger personal health or safety (a).

Where the plaintiff in a suit for restitution heaps the vilest of insults upon his wife in the plaint and charges her with immorality and adultery and does not substantiate the charge, the charge, if untrue, is in itself legal cruelty, which would justify the wife in refusing to live with her husband, and the Court will be justified in dismissing the plaintiff's suit (b). **Husaini Begam v. Rustam Ali Khan**, 4 A.L.J. 60=A.W.N. (1907), 27=29 A. 222.

STANLEY, C.J., and BURKITT, J.

References:—(a) 11 M.L.A. 551, R. (b) L.R. Ap. C. 384 (1895), R.

—13.—(Sale).

- (1) *Sale by Mahomedan mother, as guardian of a minor, of the minor's property, if void—Sale for benefit of the minor—Sale, validity of, who can impeach—Voidable—Mother, if legal guardian of the property of her minor children under Mahomedan law—Guardian de facto.*

Although, under the Mahomedan Law, a mother is not the legal guardian of the property of her minor children, yet, when she, acting as the *de facto* guardian, purports to deal with the minor's property, and such transaction is for the benefit of the minor, it is difficult to say the transaction, in the absence of fraud or any other element of that nature, ought not to stand (a). **Ram Charan Sanyal v. Anukul Chandra Acharya**, 4 C.L.J. 578=11 C.W.N. 160=34 C. 65.

MACLEAN, C.J., and CASPERSZ, J.

References:—(a) 4 C.L.J. 485, F. 1 A. 533 and 26 A. 22, R. 29 C. 473, Expl. and D. 11 C. 147 and 20 B. 116, D.

(2) Application of S. 51, Transfer of Property Act, to Mahomedans—Sale by *de facto* guardian (mother) of a Mahomedan minor, effect of—See TRANSFER OF PROPERTY ACT (IV of 1882), No. 15, 1 M.L.T. 433=17 M.L.J. 9.

—14.—(Succession).

- (1) *Mahomedan Law does not recognise the estate known as vested remainder—The Shiah Law recognises life-estate—The*

Mahomedan Law.—(Continued).**—14.—(Succession).—(Continued).**

estate of a tenant for life does not devolve upon a remainderman unless the latter survives the former.

On the death of a remainderman during the life of the tenant for life, the Mahomedan law, both Sunni and Shiah, does not recognise an estate, which is transmissible to the heirs of the remainderman.

Under the Mahomedan law applicable to Shiahs (under which life estates are recognised), the estate of a tenant for life will not devolve upon the remainderman, unless the latter survives the former. The estate of remainderman cannot be said to vest in him, so as to pass to his heirs, in the event of his decease, during the life-time of the tenant for life. **Mir Akbar Ali v. Mir Abdool Ali**, 9 Bom. L.R. 295.

RUSSELL, J.

References:—12 I.A. 91=11 C. 597, 17 W.R. 525, 17 I.A. 201, 13 B. 264, 19 I.A. 175, 17 B. 1, 8 Bom. L.R. 781, R.

- (2) *Transfer of Property Act (IV of 1882), S. 6 (a)—Spes Successionis—Non-transferable and non-releaseable—Deeds executed by pardanishin ladies—Burden of proof.*

The chance of an heir-apparent succeeding to an estate is neither transferable nor releaseable according to Mahomedan law. It is only by an application of the principle that equity considers that done which ought to be done, that such a chance can, if at all, be bound.

It was not intended by S. 6 (a) of the Transfer of Property Act, 1882, to establish and perpetuate the distinction between that which, according to the phraseology of English lawyers, is assignable in law and that which is assignable in equity. The exception in cl. (a) cannot be by reason of the future character of the chance; it must be because it was thought undesirable that it should be capable of transfer.

In the case of deeds executed by *pardanishin* ladies it is requisite that those who rely on them should satisfy the Court that they had been explained to and understood by those who executed them (a). **Sumsuddin Gulam Hoosein v. Abdul Hoosein Kallmoodin**, 8 Bom. L.R. 781=31 B. 165.

JENKINS, C.J. and BRAMAN, J.

References:—(a) 8 I.A. 39 and 29 C. 749, F. 8 Bom. L.R. 252, R.

Mahomedan Law.—(Continued).———**14.**—(Succession).—(Continued)

(3) *Shias—Succession—Childless widow—Rights of widow in possession in lieu of dower—Act No. IV. of 1882 (Transfer of Property Act), S. 6 (d)—Mortgage—Adverse possession—guardian ad litem.*

Under the Imamia Law, a widow, if she has no issue alive at her husband's death, does not inherit any of her husband's immoveable property.

A Muhammadan widow in possession of immoveable property of her deceased husband in lieu of her dower has only a lien on the property to secure payment of the dower debt; she has no transferable interest in the property (a).

A mortgagee cannot, during the continuance of the mortgage, by any act of his, render his possession adverse to the mortgagor (b).

The power to appoint a guardian *ad litem* is inherent in every Court of civil jurisdiction. Where, therefore, a Shiah Muhammadan lady had been appointed by a Civil Court guardian *ad litem* of her infant children, it was held that the appointment must be presumed to be valid and that a sale in execution of the decree obtained in such a suit was binding on the minors. **Muzaffar Ali Khan v. Parbati**, A.W.N. (1907), 221 = 4 A.L.J. 521 = 29 A. 640.

KNOX, C.J. and DILLON, J.

References:—(a) 14 M.L.A. 377, 20 A. 262, *R.* (b) 32 C. 312, *R.*

(4) *Evidence to prove custom at variance with it inadmissible—Bengal N.W.P. and Assam Civil Courts Act (XII of 1887), S. 37—Beluchi Muhammadans governed by Muhammadan Law in regard to succession—Daughters entitled to inherit—Relinquishment*

In regard to succession among Beluchi Muhammadans it was held, that, under S. 37 of the Bengal Civil Courts Act of 1887, the parties would be governed by the Muhammadan Law. Hence, evidence to prove a custom in a family excluding daughters from inheritance—such custom being at variance with the ordinary law—was inadmissible and was rightly rejected (a).

There is as much authority in the *Koran* for the daughters of a Muhammadan taking shares in their father's estate as there is in the case of sons. A deed of abandonment executed in reliance upon the generosity of the party

Mahomedan Law.—(Continued).———**15.**—(Succession) —(Concluded).

benefited was held to be without consideration. **Ismail Khan v. Imtiaz-un-nisa**, 4 A.L.J. 792.

STANLEY, C.J. and BURKITT, J.

Reference:—(a) 23 A. 20, *F.*

———**15.**—(Wakf).

(1) *Mere intention to set apart property for charity—Subsequent appropriation by will—Actual delivery of the property necessary—Testamentary bequest.*

A mere intention to set apart property for charitable purposes, followed by actual appropriation, is not sufficient to create a *wakf*.

A mere statement in a will of some gift in the past, cannot be referred back to the date, still undetermined, when that gift is afterwards alleged to have been made nor can such a narrative statement, in any view, be an adequate substitute for the oral declaration of dedication to God, which the Mahomedan Law appears imperatively to require, synchronously with the act of dedication itself.

A bare statement in a will, that the testator has, at a former time, given away or set apart a portion of his property to a charity, does not amount to a testamentary devise.

Where there has been no actual delivery, a reasonably clear declaration is necessary to create a valid *wakf*. **Banubi Umarsaheb v. Narasingrao Ranojirao**, 9 Bom. L.R. 91 = 31 B. 250.

JENKINS, C.J., and BEAMAN.

(2) *Shafei and Hanafi law of wakf.*

There is no difference between the Shafei and the Hanafi law, in respect of settlements in favour of descendants of the settlor, with the ultimate benefit for the poor in the case of failure of lineal male descendants. As such wakfs are held to be invalid in the case of Hanafis, it follows that they are invalid in the case of Shafeis (a). **Mahomed Abdulla Jitaker v. Abdul Rehman Jitaker**, 9 Bom. L.R. 298.

MACLEOD, J.

References: (a) 5 Bom. L.R. 624 and 22 C. 619, *R.*

(3) *Shares in a limited company, whether valid subject of wakf.*

Shares in a limited company cannot be the subject of a valid *wakf* under the Mahomedan

Mahomedan Law.—(Concluded).**—15.—(Wakf).—(Concluded).**

Law. **Bai Fatmabai v. Gulam Husen**, 9 Bom. L.R. 1337.

RUSSELL, J.

—16.—(Will).

- (1) *Shiah—Will, attesting witnesses ignorant of the contents of—Disinherison of heirs—Validity of will in favour of heirs.*

Held, that the rule that a will is invalid unless the attesting witnesses are made acquainted with the contents was not a definite and inflexible rule and may safely be treated as obsolete.

Held, further, that the will in this case could not be regarded as disinheriting an heir, but that it merely ingored some of the heirs.

Held, also, that a bequest by a *Shiah* Mahomedan in favour of an heir is invalid only to the extent of one-third of his estate. **Nawab Shah Alam Mirza v. Nawab Anjuman Ara Begum**, 10 O.C. 209.

CHAMIER, J.C. and SANDERS, A.J.C.

References:—2 C. 184, *expl. and D.*

- (2) *Bequest to legal sharers—Power of disposing one-third of the property—Bequest to trustees for charitable purposes—Void for uncertainty of subject-matter.*

Where, under the will of a Mahomedan testator, the widows have received more than they are entitled to, under Muhammadan Law, as legal share, i.e., one-eighth of the estate, a decree for the balance over and above their share should be passed against them.

Muhammadan Law permits a very wide scope to a testator as regards the one-third of his property which he may dispose by will. His power of disposition for expenditure on charitable or religious purposes is subject to very slight restrictions.

Bequest of property by a Mahomedan testator for such charitable objects as the trustees appointed under the will may think proper, or for such purpose as that by which the testator may obtain eternal bliss, though valid under Mahomedan Law, is, on general principles applicable to all testators, inoperative and void on account of uncertainty of the subject-matter of the trust (a). **Shahab-ud-din v. Sohan Lal**, 75 P.R. 1907.

ROBERTSON and LAL CHAND, JJ.

References:—(a) 22 B. 774, 23 B. 725, 30 B. 500, 31 C. 895, 9 Ves. 399 and L.R. 8. Ch. Dn., 854, R.

Maintenance.

- (1) *Raj—Babuana or maintenance grant to younger members—Confiscation of Raj by Government—Effect on grantees—Restoration of Raj—Effect on rights acquired from Government during confiscation—Conditions of grant—Breach—Forfeiture.*

When the question was, whether a grant of lands originally made for the maintenance of younger members of the family, was resuable for alleged breach of condition of the grant, and it appeared that, subsequent to the grant, the parent estate was confiscated by Government, and Government settled with the grantees the lands held by them:

held, that this constituted a new settlement, and when subsequently Government restored the estate to the grantor's heir, the transaction did not operate to recreate the maintenance grant with the conditions.

When Government confiscated the estate, all rights of the grantor, as well of the persons holding lands in the estate, lapsed.

The subsequent restoration of the estate did not destroy rights acquired, whilst the estate was under forfeiture (a). **Raja Narpal Singh Deo v. Kasiram Singh Deo**, 11 C.W.N. 655.

BRETT and SHARFUDDIN, JJ.

Reference:—(a) 7 C.W.N. 57 = 29 C. 828, R.

- (2)—*charged on family property—Sale of property in execution of maintenance decree, without fresh suit—Transfer of Property Act, Ss. 99, 100.*

A maintenance decree, which only declares a charge on the family property, and was passed long after the Transfer of Property Act came into force, cannot be regarded as ordering the sale of the properties charged, in execution of the decree (a). The case comes within S. 99 of that Act, and the decree-holder cannot bring the properties charged to sale, without instituting a fresh suit. **Venkatasubamma v. Venkanna**, 17 M.L.J. 217.

BENSON and WALLIS, JJ.

Reference:—(a) 24 M. 689, R.

- (3) *Suit for sale on foot of a mortgage of property subject to a charge for—See TRANSFER OF PROPERTY ACT, No. 30, 3 A.L.J. 848 = A.W.N. (1907), 18.*

(3-a) *Maintenance decree—Maintenance to be paid at certain rate per annum from date of plaint—Construction—See RES JUDICATA, No. 2, 17 M.L.J. 402.*

Maintenance.—(Concluded).

(4) Whether order for, under S. 488, Cr. Pr. Code, a bar to jurisdiction of Civil Courts—See JURISDICTION (OF CIVIL COURTS), No. 9, 2 M.L.T. 344.

Majority Act.

See ACT IX of 1875.

Malabar tarwad.

(1) Suit by member of, to set aside *karar* entered into during his minority by adult members of the *tarwad*—Nature of suit—See COURT FEES ACT (VII of 1870), No. 3, 1 M.L.T. 412=30 M. 18.

Malicious prosecution.

(1) *Suit for—Judgment of the Magistrate in the prosecution—Evidence in the Civil Suit—Evidence Act (I of 1872), Ss. 11, 13, and 43.*

In deciding a suit for damages arising from a malicious prosecution, the Judge treated the judgment of the Magistrate and the evidence given before the Magistrate in the prosecution complained of, as evidence in the case. And looking at the judgment of the Magistrate as being a record of the facts found, the Judge came to the conclusion that the plaintiff was not present at the time when the alleged offence was committed and decreed the plaintiff's claim. On appeal:

Held, that it was not permissible to the Judge to utilise the judgment of the Magistrate in the way he did; and that S. 43, 13 or 11 of the Evidence Act, 1872, did not apply to the case.

The law applicable in India to suits for malicious prosecution is the same as is laid down in the case of *Abrath v. North Eastern Railway Co.* (a). **Gulabchand Gopaldas v. Chunilal Jagjivandas**, 9 Bom. L.R. 1134.

RUSSELL, AG. C. J. and KNIGHT, J.

Reference.—(a) (1886) 11 App. Cas. 247, F.

(2) *Suit for damages for—whether maintainable against a Municipal Committee.*

A Corporation such as a Municipal Committee is not, in the eye of law, incapable, in its corporate capacity, of a malicious intention. Proceedings, such as a suit for damages for malicious prosecution, in which it might be necessary to prove actual malice, could therefore be instituted against such a Committee. **Amar Nath v. Municipal Committee, Kartapur**, 86 P.R. 1906=71 P.L.R. 1907.

REID, C. J.

Malicious prosecution.—(Concluded).

References :—L.R. Q.B.D. (1900), 22, F. L. R. 11 App. Cas. (1886), 247, R.

(3) *Suit for damages for—Formal order of discharge or acquittal not necessary—Termination of trial—See LIMITATION ACT, No. 61, 17, M.L.J. 60.*

Malikana and Dusturat.

(1) *Grants made before the Permanent Settlement—Nature and incidence—Liability of Government—Lakhiraj jagirs—Resumption.*

In the Behar Districts, the payment of Malikana dates from a period long anterior to that of the Permanent Settlement.

The Permanent Settlement put an end to the system of paying Malikana to proprietors, except in those cases, where they declined the terms offered to them at the Settlement, and preferred to remain out of possession.

But, previous to the Permanent Settlement, large tracts of land in Behar had been settled by Government with Lakhirajdars, the proprietors being compensated by permanent hereditary pensionary allowances, styled Malikana or Dusturat and Malikana payable out of the jagirs. When, subsequently, these jagirs were resumed, the Government, as occupying the position of jagirdars, became liable for the payment of the Malikana. When the lands were re-settled with the jagirdars themselves, the Malikana previously due from them were, added to the Government revenue with which they were assessed, and the Malikans were paid by the Collector out of the treasury. When, on the other hand, the resumed jagirs were settled with persons other than the jagirdar, the land settled still remained liable for the payment of the Malikana, such Malikana being payable, either out of the Malikana, as assessed under S. 3 of Reg. II of 1819 and S. 5 of Reg. VII of 1822, or added as an additional sum payable by the settlement holder, over and above the Revenue and Malikana so assessed.

Government subjected itself to loss, when, in re-settling the lands, it omitted to make provisions for the recovery of the Malikana from the settlement holders in the above manner.

If, however, the lands, by any process of transfer or merger, came into the possession of the proprietor, the Malikana allowance or a rateable share of it came to an end, and the Government, of re-settlement after resumption,

Malikana and Dusturat.—(Concluded).

became entitled to be relieved of their liability *pro tanto*, **Rameshwar Singh v. The Secretary of State for India**, 11 C.W.N. 448=5 C.L.J. 349.

MITRA and CASPERSZ, JJ.

Malik Makbuza.

(1) Tenant of—Nature of tenancy—See ACT XI OF 1898 (C.P. TENANCY), No. 7, 3 N.L.R. 162.

Mamlatdar's Court Act.

1 See ACT III OF 1876 (BOMBAY) and ACT II OF 1906 (BOMBAY).

Market.

(1) Right of *zemindar* to establish a market on his own land—Regulation No. XXVII. of 1793—Regulation No. VII of 1822, S. 9

There is no legal objection to the holding by any person of a "hat" or market whenever and wherever he may please, provided, that he does so on his own land, and in such a way as not to be a nuisance to neighbouring land-holders who have equal rights with him. **Sukhdeo Prasad v. Nihal Chand**, A.W.N. (1907), 248 =4 A.L.J. 728.

KNOX, C.J. and DILLON, J.

References:—N. W. P. H. C. R. (1874), 104, 40 S. D. A. (1869), 40, S. D. A. (1860), 439, S. D. A. (1867), 27, R.

Market value.

Evidence of—Price actually paid—See PRE-EMPTION, No. 6, 10 O.C. 88.

Marriage.

(1) Evidence of—Conduct of relations and friends—Documentary and oral evidence—Onus.

It is for the person, who says that a marriage took place, to bring forward satisfactory evidence in support of the alleged marriage. When there is no documentary evidence in support, and no certain inference can be drawn from the evidence as to the conduct of relations and friends, the oral evidence in the case being wholly untrustworthy:

Held, that the marriage was not proved. **Amjad Ali Khan v. Nawab Ali Khan**, 5 C.L.J. 1 (P. C.)=17 M.L.J. 56=9 Bom. L.R. 264.

LORD MACNAGHTEN, LORD ATKINSON, SIR ARTHUR WILSON and SIR ALFRED WILLS.

(2) Deed—Enforcement of—Agreement by a father-in-law to pay pin-money to daughter

Marriage.—(Concluded).

in-law—Daughter-in-law entitled to enforce it—Unchastity or residence with husband.

Appellant was, during her minority, married to respondent No. 1's son. Respondent No. 1 executed, before the marriage, a document whereby he undertook to pay to the appellant Rs. 500 a month as *sarf-pandan* (expenses for betel leaves, i.e., pin-money), from the date on which her *dola* was received in the husband's house, which expression was, in the deed itself, explained to mean the date of her marriage. After some time, the appellant left her husband's house. She brought this suit to recover arrears of her pin-money by sale of some property, which was charged with it. The defence raised by the father-in-law was that she had become unchaste and did not reside at her husband's house.

Held that the document in question having been executed for her benefit, she could sue upon it and was entitled to recover the arrears, and that the question of unchastity or her refusal to live with her husband was entirely immaterial, as the document did not lay down that she would be entitled to get the pin-money, only during her chastity or if she lived with her husband. **Husaini Begam v. Khwaja Mqhom-mad Khan**, 4 A.L.J. 13=A.W.N. (1907), 3=29 A. 151.

STANLEY, C. J. and BURKITT, J.

(3) Money received by a member of Joint Hindu family at, is his separate property—See HINDU LAW (JOINT FAMILY), No. 16, 12 C.W.N. 103.

Married Woman's Property Act.

See ACT III OF 1874.

Marumakkatayom Law.

- 1—ALIENATION.
- 2—GIFT.
- 3—SUCCESSION.
- 4—TARWAD.

—1.—Alienation.

(0) Hypothecation by a junior member—Presumption as to self-acquisition—Proof of consideration and as to necessity—Estoppel.

The plaintiff sued for enforcing a hypothecation deed executed by a deceased junior member of a Malabar Tarwad, against the properties comprised in the hypothecation deed. He contended among others that all the properties hypothecated were the self-acquisition of the deceased hypothecator, that, even if

Marumakkatayom Law.—(Continued).—1.—**Alienation.**—(Concluded).

they be held to be the tarwad property of the deceased, they were liable, as the debt was contracted by him in his capacity as *de facto* manager, and that the defendant, the present Karnavan, was estopped from denying consideration and necessity for the debt.

It was held:—(1) that properties acquired by a junior member of the Tarwad had to be presumed to be his self-acquisition until the contrary is proved; (2) that, as payment of consideration was proved, the self-acquired properties of the deceased hypothecator were liable, though it was not proved that the debt was supported by Tarwad necessity; and (3) that, as regards the relief claimed against the Tarwad, the defendant's representation or conduct could operate as an estoppel, only if the tarwad was represented by him at the time of the transaction which was alleged to have given rise to the plea of estoppel; and, as he was neither the *de facto* nor the *de jure* karnavan at that time, such a plea could not be sustained. **Kanaku Parameswaran Kesavan v. Govindan Kumaran**, 22 T.L.R. 121.

PADMANABA IYER, RAMACHANDRA ROW and
EAPEN, JJ.

—2.—**(Gift).**

(1) *Gift to eldest son or purchase in his name*—Presumption—Reference to Full Bench by Division Bench.

A gift to an eldest or only son by his parent, or purchase in his name of immoveable property, whether that eldest or only son be the eldest child of his mother or not, raises a strong presumption (which can, of course, be rebutted by cogent evidence *contra*) that the gift or purchase was for the benefit of the Sub-Tarwad of which that eldest or only son is the Karnavan (a).

Division Benches of the Travancore High Court can refer to the Full Bench a particular question or questions of law without referring the whole case (b).

Quære: Whether a gift or purchase in the name of the eldest daughter or of a junior child, not being the eldest son, will raise such presumption. Whether the presumptions in the case of moveables will differ with the nature of the moveable and sex of the donee. Whether there is a difference in other cases, than those of the mother and the eldest son, between purchases in their names with the father's money

Marumakkatayom Law.—(Continued).—2.—**(Gift).**—(Concluded).

and gifts. **Koshi Thoma v. Narayanan Krishnan**, 22 T.L.R. 239 (F.B.)

SADASIVA AIYAR, C.J., GOVINDA PILLAI and
RAMACHANDRA ROW, JJ.

References:—(a) 11 T.L.R. 139, 18 T.L.R. 215, F.A.S. 237 & 242 of 1077 and A.S. 68 of 1072, R; (b) 20 T.L.R. 41, 11 T.L.R. 4, 15 T.L.R. 133, 3 C.L.J. 29, 67, 10 C.W.N. 719=33 C, 927, 15 W.R. 21, 8 W.R. 4 23 R.

—3.—**(Succession)**(1) *Separate acquisition by female member.*

Held by Full Bench (Muthunayagam Pillai, J., dissenting) that the self-acquired property of a female member of Malabar Tarwad as well as property acquired by gift from a stranger devolve, on her death to the sub-Tarwad of which she is a member in preference to the common Tarwad (a).

Per Govinda Pillai, J.—The policy of the modern Marumakkatayom Law, unlike the archaic law, is to give enlarged powers to the acquirer and a preferential right of succession to the members of the Sub-Tarwad.

Per Nunt, J.—(1) Gifts by father to any son, in the absence of intention, presumably enure to the benefit of all the donor's children and lapse in the case of males, to the Tarwad, in the absence of a sub-tarwad to which the donee belonged.

(2) *Self-acquisitions lapse in like manner.*

(3) Gifts by a stranger are governed by intention, and, ordinarily speaking, lapse in like manner.

In the case of females, (1) gifts to an unmarried daughter by a father are presumably for the benefit of her brothers and sisters; if married, they would, in the absence of intention, presumably enure to the benefit of herself and children and lapse to the Sub-Tarwad of which she is the ancestress, and, in the absence of such or of any Sub-Tarwad to which she belongs, to the common Tarwad; (2) gifts by a husband are presumably intended for the benefit of the wife and children begotten of her by the donor and belonged to the Sub-Tarwad of which she is the ancestress. Where she has no issue, it would devolve, on a forgoing with herself acquisitions, to her Sub-Tarwad if any and, default, to the main Tarwad; (3) gifts by a stranger, in the absence of any intention express or implied, descend to the children as

Marumakkatayom Law.—(Continued).**—3.—(Succession).—(Concluded).**

will her self-acquisitions, and, where she dies issueless, the properties will devolve to the common *Tarwad*, in the absence of any Sub-*Tarwad* to which she may belong.

Per Muthunayagam Pillai, J.—There is no essential difference in status between a member of a “Sub-*Tarwad*” and a member of a branch *Tarwad* in relation to the common *Tarwad*. Both alike keep up their rights to the common *Tarwad* property and enjoy the privileges of the communion. The accidental circumstance that a particular member happens to possess some property as *Makkatayom* cannot affect the status as a member; nor does it affect the *ratio decidendi* of the ruling in 15 T.L.R. 57. **Panapilla Janaki Pilla Narayani Pilla v. Kanakku Krishnan Narayanan**, 22 T.L.R. 278, (F.B.).

GOVINDA PILLAI, HUNT and MUTHUNAYAM PILLAI, JJ.

References :—15 T.L.R. 57, *Diss*; 10 T.L.R. 136, 15 T.L.R. 104, 11 T.L.R. 139, 9 T.L.R. 42, 70, 28 M. 1, 17 T.L.R. 69, 4 M. 150, 2 M. H.C.R. 162, 2 T.L.R. 2 (F.B.), 2 T.L.R. 38, 9 T.L.R. 102, 12 T.L.R. 211, 17 M.L.J. 160, 4 T.L.R. 25, 5 T.L.R. 116, 13 T.L.R. 72, 18 T.L.R. 215, A.S. 248 of 1073, S.A. 24 of 1079, A.S. 36 of 1082, A.S. 208 of 1079, 29 M. 322, 25 M. 662, 4 C. 744, 14 B.L.R. 235, 20 C. 116, R.

—4.—(Tarwad).

- (1) *Decree against female member of the tarwad for recovery of property—Herself becoming Karnavan—Nature of her possession—Subsequent suit by succeeding Karnavan—C.P.C., Ss. 238 & 532—*

A decree for possession of certain properties was obtained against a female member of a *tarwad* by the *Karnavan* of that *tarwad*. After the death of the *Karnavan* the female member succeeded to him, there being no male member fit for the office. It was held that the decree for possession was satisfied when she became head of the *Tarwad*. Her possession was that of the *Tarwad*.

In a suit brought by a succeeding *Karnavan*, after he attained his majority, it was held that limitation began to run only from the date when the plaintiff became *Karnavan*, the suit being really one for a second loss of possession which occurred only when the defendant ceased to represent the

Marumakkatayom Law.—(Concluded).**—1.—(Tarwad).—(Concluded).**

Tarwad. Such a suit was not barred by S. 238, C.P.C., or by adverse possession.

Quaere.—Whether a person who was made respondent *pro forma* could file a memo of objections, directed, not against the appellant, but against a co-respondent?

According to the Explanation to S. 532, C.P.C., it is only when a respondent's rights as decided by the first Court are put into risk by the appeal that the respondent is entitled to a hearing of his own objections against the decree. **Lakshmi Narayani v. Kanakku Padmanabhan Parameswaran**, 22 T.L.R. 183.

SADASIVA IYER, C.J., & GOVINDA PILLAI, J.

Master and Servant.

Servant delegating his authority to another—Delegation beyond the scope of his authority—Damage—non-liability of master—See *Torts*, No. 3, 3 N.L.R. 101.

Medical evidence.

(1) When preference is to be given to the weight of,—when age of a minor is in dispute—See *LIMITATION*, No. 2, 6 P.W.R. 1907.

Mela.

(1) *Mela* or fair, whether immoveable property—See ACT IX OF 1880 (CESS, BENGAL), No. 2, 11 C.W.N. 1053.

Memorandum of objections.

(1)—Allowed between co-respondents—See *CIV. PRO. CODE*, No. 279, 17 M.L.J. 62.

Mesne profits.

- (1) *Mesne profits, application for ascertainment of—Dismissal for default—Fresh application—Limitation.*

Where more than thirty days after an application for ascertainment of mesne profits was dismissed for default, a fresh application was made for that purpose.

Held, that the application was not barred. Applications for determination of mesne profits are applications for execution of the decree in which they were granted; and the striking off of such cases does not finally decide them, or prevent the decree-holder from making a further application for the determination of mesne profits. There is no substantial distinction between an order striking off an application and one

Mesne profits.—(Continued).

dismissing it for default. **Upendra Chandra Singh v. Sakhi Chand**, 12 C.W.N. 8.

RAMPINI and SHARFUDDIN, JJ.

(2) *Decree for, silent as to interest—Execution proceedings, if interest can be claimed in—Proceedings for ascertainment of mesne profits, nature of.*

* A proceeding for the ascertainment of mesne profits is a proceeding in continuation of the original suit, and the order by which the amount of mesne profits is assessed and awarded is the final decree for mesne profits in such suit. It is a decree which is capable of execution, and the period of twelve years, mentioned in S. 230, Civ. Pro. Code, runs from the date when a valid decree for mesne profits has been made, and not from the date of the decree by which the liability to pay mesne profits was originally declared.

Where a decree declares that the plaintiff is entitled to mesne profits, and says nothing about interest, if the amount of mesne profits is left for determination by the Court of execution, the decree-holder is entitled to interest upon the mesne profits and to have such interest added to the mesne profits when they are ascertained (a).

But if the Court which ascertains the mesne profits has omitted to allow interests, it is not open to the Court which executes the decree for mesne profits to allow interest in execution proceedings. The Court which executes a decree must execute it as it stands. There is no rule which makes it obligatory upon the Court to allow interest on mesne profits; it is a matter of judicial discretion, to be exercised according to the circumstances of the case. If the Court which assesses mesne profits improperly exercise its discretion and disallows interest on erroneous grounds, the remedy of the decree-holder is by way of an appeal. He cannot claim interest in execution proceedings when the decree for mesne profits is silent as to interest (b). **Harmnoje Narain Singh v. Ramprosad Singh**, 6 C.L.J. 462.

MOOKERJEE and HOLMWOOD, JJ.

References :—(a) 27 C. 951; 33 C. 329, R; (b) 11 I.A. 88=10 C. 785; 27 C. 951, R.

(3) *Suit for redemption—Second suit to recover mesne profits from the date of tender of mortgage amount to date of delivery of possession—See CIV. PRO. CODE, No. 26, 9 Bom. L. R. 958.*

Mesne profits.—(Concluded).

(4) *Meaning of—See CIV. PRO. CODE, No. 48, U.B.R. (1901), Civil Procedure, 50.*

Mines.

Road Cess and Income-Tax, if leviable on the net profits derived from mines—See ACT IX OF 1880 (ROAD CESS, BENGAL) No. 3, 5 C.L.J. 148.

Minor.

(1) *Arrangement by brothers on behalf of a Mahomedan minor—Repudiation by next friend of minor, without restoring to other party advantages gained—Suit whether maintainable.*

A suit by a next friend of a Mahomedan minor to repudiate an arrangement of his brothers made on his behalf during his minority, and acted upon by the other party, is not maintainable, without the minor offering to place the other party in the same position, which the latter occupied at the time of the arrangement, even though the brothers had no authority under Mahomedan Law to make any sort of arrangement as regards the minor's immoveable property (a). **Nur Muhammad v. Almna**, 91 P.R. 1907.

CHATTERJI and JOHNSTONE, JJ.

Reference :—(a) 65 P.R. 1893, R.

(2) *Compromise decree affecting minors' interest—Compromise filed by pleader without guardian's consent—Right to set aside compromise decree on grounds other than that of fraud.*

In a suit in which minors' interests are involved, where a decree is passed by the Court, upon an adjudication of the merits of the case, there, no separate suit will lie, except when the decree is impugned upon the ground of fraud, and the only remedy of the minor is by an application for review; but, where the Court comes to no decision, and the decree is passed simply upon the compromise, there, a suit should lie to set aside the decree, upon grounds other than fraud. Although the minors have set up a case of fraud *qua* the decree, and failed to prove it, they may still be permitted to show by evidence that the compromise itself was filed without the consent of their guardian and is not, therefore, binding upon them. In order that the minors be bound by the decree, it is not, however, enough to show that the sanction of the Court was obtained to the compromise. **Surendra Nath Ghose v. Hemangini Dasi**, 34 C. 83.

GHOSE and CASPERSE, JJ.

Minor.—(Continued).

References:—6 B.L.R. 648=15 W.R. 23 (P.C.); 13 B.L.R. App. 11=22 W.R. 213; 10 C. 612; 2 C.L.J. 508; 3 C.L.J. 119; 28 A. 585, R.

- (3) *Decree against*—Representation by Nazir as guardian *ad litem*—Ex parte decree—Practice and Procedure.

The mere circumstance that the Nazir, who was appointed a guardian *ad litem*, did not defend the suit, because he had no instructions, cannot affect the validity of the decree.

The mere fact that a decree is obtained *ex parte* does not make it illegal or invalid. **Yishnu Narayan v. Dattu Vasu Deo**, 9 Bom. L.R. 1099.

CHANDAVARKAR and PRATT, JJ.

- (4) Hindu girl living with maternal grandmother—Father married again—Whether a fit guardian—See ACT VIII OF 1890 (GUARDIAN AND WARDS ACT), No. 3, 4 A.L.J. 22.

- (5) Sale of property for benefit of, who can impeach validity of—See MAHOMEDAN LAW (SALE), No. 1, 4 C.L.J. 578=11 C.W.N. 160=34 C. 56.

- (6) Question whether a sale was for benefit of the, whether a question of fact or law—See MAHOMEDAN LAW (ALIENATION), No. 1, 4 C. L. J. 485=11 C.W.N. 71=34 C. 36.

- (7) Right of minor member of a joint family to sue for partition—See HINDU LAW (PARTITION), No. 6, A.W.N. (1907), 86.

- (8) Transferee from the guardian of—in possession with the consent of the guardian—Binding nature of consent on—Guardian not personally interested—See TRANSFER OF PROPERTY ACT, No. 14, 4 A.L.J. 181.

- (9) Grant of letters of administration to husband for use and benefit of minor wife—See ACT V OF 1881 (PROBATE AND ADMINISTRATION), No. 2, 11 C.W.N. 697.

- (10) Court's duty in raising issues, where minors are concerned—See HINDU LAW (JOINT FAMILY), No. 3, 9 Bom. L.R. 114.

- (11) Citation on minor—Minor represented by applicant as guardian—Proceeding defective—Revocation, application for—See ACT V OF 1881 (PROBATE AND ADMINISTRATION), No. 4, 12 C.W.N. 6.

- (12) Female minor's right to sue for compensation for breach of promise of marriage

Minor.—(Concluded).

under the Contract Act and under Buddhist Law—See CONTRACT ACT, No. 2, U.B.R. (1907), Contract, 5.

Misjoinder.

- (1) *Persons in possession to be impleaded as defendants*—Partition of joint family property, suit for—Parties to such a suit.

In a suit for partition of joint family property, the plaintiff not only impleaded the members of the family, against whom he claimed partition, but also those, who were in possession of portions of the alleged family property. The defendants raised the plea of misjoinder.

Held, that there was no misjoinder. The one main cause of action against all the defendants was, that they were in possession of the plaintiffs' shares in the joint family property and refused to give them up, and if any separate cause of action were alleged, they were only subsidiary to the main cause of action. **Pandit Ikbai Narain v. Pandit Suraj Narain**, 10 O.C. 32.

CHAMBER and EVANS, J.CS.

Reference.—16 B. 603, R.

- (2)—of plaintiffs and causes of action—Six plaintiffs in libel suit, if suit to be dismissed—See CIV. PRO. CODE, No. 35, 11 C.W.N. 680.

- (3) Transfer of last male owner's property to different persons at different dates under separate deeds—suit for recovery of property—One cause of action—No misjoinder—See CIV. PRO. CODE, No. 194, 4 A.L.J. 121.

Mistake.

- (1) Movable property delivered to defendant under erroneous order of Magistrate—Suit to recover same by true owner—Limitation—See LIMITATION ACT, No. 65, 1 M.L.T. 397=16 M. L.J. 541=30 M. 12.

Mistake of Law.

- (1) Erroneous opinion on a point of law—*Res judicata*—See CIV. PRO. CODE, No. 15, 8 Bom. L.R. 932=81 B. 128.

- (2) Omission to consider part of defence owing to erroneous view of Law—Revision by High Court—See CIV. PRO. CODE, No. 304, 10 O.C. 8.

- (3) Erroneous decision of question of law—Re-trial of the same question—See *RES JUDICATA*, No. 17, 17 M.L.J. 250.

Mortgage.

1—GENERAL.

2—ANOMALOUS MORTGAGE,

3—CONDITIONAL SALE.

4—ENGLISH.

5—EQUITABLE.

6—FORECLOSURE.

7—REDEMPTION.

8—SIMPLE MORTGAGE.

9—USUFRUCTUARY.

-1.—(General).

- (1) *Mortgagee holding two mortgages over same property—Suit for sale on first mortgage—Subsequent suit on second mortgage barred—Remedy of mortgagee in such case.*

Where a mortgagee, with two mortgages on the same property, obtained a decree for sale of the mortgaged property in satisfaction of the first mortgage, he is debarred from bringing a subsequent suit for sale on the second mortgage, even though he made no mention of the second mortgage in the plaint in the former suit (a). But it may be open to him, when the decree in the first suit is executed, to enforce his claim on the second mortgage under S. 97 of the Transfer of Property Act, by proceeding against any surplus that remains after satisfying the decree. **Krishnamachariar v. Anangarachariar**, 17 M.L.J. 301=2 M.L.T. 380=30 M. 353.

BENSON and WALLIS, JJ.

References:—24 A. 429 (P.C.), *Appl*; 25 M. 108, *R*; 20 A. 322, *Diss*.

- (2) *Same property mortgaged to one person by two deeds—First usufructuary, second simple—Suit on the second for sale free of the prior encumbrance—Transfer of Property Act, Ss. 97 and 99.*

Where a person, holding two mortgages on the same property, the prior mortgage being usufructuary, and the other a simple mortgage, obtains a decree on the latter mortgage, there is nothing in the Transfer of Property Act to prevent the plaintiff from applying for sale of the mortgaged property free of encumbrance, and have his prior usufructuary mortgage satisfied first out of the sale proceeds, and the balance applied towards the satisfaction of the decree on the simple mortgage deed (a). Ss. 99 and 97 of the Transfer of Property Act do not exclude an usufructuary mortgage; and so, the

Mortgage.—(Continued).

—1.—(General).—(Continued).

provisions of these sections may be applied to such a mortgage. **Rangaswami Nadan v. Subbaraya Aiyar**, 17 M.L.J. 408=2 M.L.T. 346=30 M. 408.

BODDAM and MILLER, JJ.

References:—(a) 26 A. 14, *Diss*; 29 M. 424, *F*; 17 M.L.J. 301, *R*.

- (3) *Same property under two different deeds to same mortgagee—portion sold to satisfy earlier mortgage—released from the obligation of the later mortgage—purchases by mortgagees—effect of.*

Where sixteen villages were mortgaged to the same mortgagees under two deeds of mortgage of different dates, and the mortgagees brought a suit for sale on the earlier mortgage, sold 10 of those villages and purchased them themselves, *held* that those 10 villages must be deemed to be withdrawn from the operation of the mortgage by title paramount. The remaining villages were, therefore, liable to satisfy the whole of the subsequent mortgage. The fact that the mortgagees themselves purchased the 10 villages cannot be regarded as having the effect of making the property, which was included in the earlier mortgage, responsible for the satisfaction of the latter incumbrance (a). **Raghunath Prasad v. Jamuna Prasad Rawat**, 4 A.L.J. 66=29 A. 233=A.W.N. (1907), 31.

STANLEY, C.J., and BURKITT, J.

References:—(a) F.A. 63 of 1903 and 1906, A.W.N. 150, *F*.

- (4) *Suit for pre-emption—Mortgage of right in the property sought to be pre-empted—Mortgagee obtains a charge—valid mortgage—equity treats as done what ought to have been done.*

K brought a suit for pre-emption. He borrowed money to carry on the suit and mortgaged the property, the subject-matter of the pre-emption suit. Afterwards, he obtained a decree. *Held* that, when the mortgagor acquired by pre-emption and got possession of the property, equity, treating that as done which ought to be done, gave the mortgagee a charge by way of mortgage upon the pre-empted share and placed him in the position of a mortgagee. The mortgagees, therefore, could bring the pre-empted property to sale (a). **Gaya Din**

Mortgage.—(Continued).

——1.—(General).—(Continued).

v. Kashi Gir, 4 A.L.J. 57 = A.W.N. (1907), 7 = 29 A. 168.

STANLEY, C.J. and BURKITT, J.

References :—(a) 10 H.L. 210 ; 19 C. D. 342. 10 A. 133, R.

- (5) *Holder of first and second mortgages—Two mortgage decrees in his favour in different Courts—Latter decree on the first mortgage silent on the prior decree on the second mortgage—Third mortgagee party to both suits—Priority.*

On the same property, the appellant held the first two mortgages, and the respondent held the third mortgage. The appellant obtained a decree on the second mortgage in the District Munsiff's Court making the respondent a party. He subsequently sued on the first mortgage in the District Court and obtained another decree, to which also the respondent was a party. In the latter suit, no mention was made of the prior decree on the second mortgage.

Held that, in execution of the latter decree, the surplus after satisfying the first mortgage should be paid to the third mortgagee, and the District Judge was not at liberty to give priority to the appellant's second mortgage, contrary to the terms of the decree. **Pichuvaiyar v. Vadivelan Pillai**, 17 M.L.J. 332.

BENSON and WALLIS, JJ.

Reference :—25 W.R. 187, R.

- (6) *Mortgage suit—Second mortgagee—Sale in execution of decree obtained by first mortgagee—Purchase by mortgagor in the benami of another—Lien and charge of second mortgagee, if subsisting—Purchaser, if a proper and necessary party to the suit of the second mortgagee—Party, objection as to, not taken at the trial—Estoppel.*

The effect of a sale, under a power of sale, is to destroy the equity of redemption in the land and to constitute the mortgagee exercising the power, a trustee of the surplus proceeds, after satisfying his own charge, first, for the subsequent incumbrancers, and ultimately for the mortgagor ; the estate, if purchased by a stranger, passes into his hands free from all the incumbrances (a).

If, upon a sale by the first mortgagee, the property is purchased by the mortgagor himself, the mortgagor can only acquire the estate, subject to the second mortgage, upon

Mortgage.—(Continued).

——1.—(General).—(Continued).

the principle that it is his duty to discharge the estate for the benefit of the second mortgagee ; such purchase does not in any way prejudice the second mortgagee, even if the second mortgagee was a party to the suit by the first mortgagee, and had an opportunity given to him for redemption (b).

The estate or interest in the land which is drawn within the operation of a mortgage suit, which will be affected and bound by the decree, is the estate created and passing by the mortgage, or estates or interests subsequently acquired by the mortgagor, and enuring by way of estoppel to the benefit of the mortgagee, and not only the mortgagor but all persons, deriving title from him subsequent to the mortgage and bound thereby as holders of different fragments of the equity of redemption, are necessary and proper parties to the suit to enforce the mortgage (c).

The question whether the title which a third person, a purchaser in execution of the decree obtained by the first mortgagee, alleges to have acquired after the plaintiff's mortgage, is or is not a real title, which is entitled to priority over the mortgage sought to be enforced, is a question which may be tried and adjudged in a mortgage suit (d).

The question is not one of jurisdiction, but rather of the form of the litigation, and the scope of its enquiry, or in other words, a question of multifariousness and convenience affecting the discretion only, and not the jurisdiction of the Court.

Having assumed the role of being a proper and necessary party defendant, having pleaded to the merits, a person cannot, after being cast in the suit, change front and insist that error occurred in making him a party defendant. Parties litigant are not allowed to assume inconsistent positions in Court ; having elected to adopt a certain course of action, they will be confined to the course which they adopt (e). **Bhaja Chowdhury v. Chuni Lal Marwari**, 5 C.L.J. 95 = 11 C.W.N. 264.

RAMPINI and MOOKERJEE, JJ.

References :—(a) 6 I.A. 145 = 5 C. 198, (211). F. (b) 2 Kay and J. 650, 1 John. and Hem. 222 (223), L.R. 17 Ir. 515 (527), 1 Mont. Dea. and Deg. 333, 4 Deg. M. and Gr. 474, 27 Ch. D. 246 (251), 94 U.S. 405, 157 Mass. 57, 81 N.E. 717, 39 Minn. 490—40 N.W. 568, 5 C.L.R.

Mortgage.—(Continued).

—— 1.—(General).—(Continued).

227, 8 C.W.N. 828, 28 C. 397, A.W.N. (1903), 75=25 A. 371, 16 I.A. 129=17 C. 23, R. (c) 119 Alabama 480, 33 C. 425=3 C.L.J. 205, 45 Fed. Rep. 18, 34 Michigan 221, R. (d) 17 Wisconsin 211—24 A.M. St. Rep. 706, 66 Fed. Rep. 411, 36 Minn. 59—f A.M. St. Rep. 635, 78 Alabama 351, 134 U.S. 559, 123 U.S. 747, R. (e) 110 Missouri 173—19 S.W. 642, 8 C.W.N. 365, R.

- (7) *Subsequent purchaser not made a party—Sale—Purchase by mortgagee himself—Mortgagee's right to sue for possession—Suit for sale—Limitation.*

Where a mortgagee, A, brought a suit on his mortgage, without making one D, a subsequent transferee from the mortgagor, a party, although he had notice of the transfer, and, in execution of the decree obtained in the suit, purchased the property himself.

Held—that a suit by A for the recovery of possession of the property from D does not lie, and A's only remedy is by a suit for sale (*a*). **Aghore Nath Banerjee v. Deb Narain Guin**, 11 C.W.N. 314.

RAMPINI and WOODROFFE, JJ.

References :—19 A. 541 and 21 A. 235, F.

- (8) *Mortgage suit—Remedy of mortgagee against purchaser of portion of mortgaged property, not made a party within time.*

When, in the course of a suit to enforce a mortgage, but more than 12 years after the date fixed in the mortgage-bond for repayment of the mortgage money, the Court directed that a purchaser of a portion of the mortgaged property be added as a party defendant.

Held—that the suit as against the added defendant was barred by limitation.

Quære : Whether the portion of the mortgaged property in the hands of the added defendant was thereby exempted from liability under the mortgage. **Ramkinkar Biswas v. Akhil Chandra Chowdhuri**, 11 C.W.N. 350 (F.B.)=5 C.L.J. 242=2 M.L. T. 137.

MACLEAN, C.J., HARRINGTON, BRETT, MITRA and GEIDT, JJ.

- (9) *Sale of equity of redemption in portion of mortgaged property to discharge prior mortgage decree—Right of purchaser to recover purchase money paid by him from puisne mortgagee in suit by the latter to enforce his mortgage—Revenue sale of portion of mort-*

Mortgage.—(Continued).

—— 1.—(General).—(Continued).

gaged property—Re-purchase by purchaser of equity of redemption in that portion—Rights of purchaser—Rights of puisne mortgagee in that portion—Transfer of Property Act, S. 65.

Where a portion of the mortgaged property is sold by the mortgagor to discharge a prior mortgage decree, a *puisne* mortgagee can enforce his mortgage against the portion sold, and the purchaser cannot claim from the *puisne* mortgagee the purchase money paid by him.

Under S. 65, Transfer of Property Act, the mortgagor must, no doubt, be taken to covenant, in the absence of contract to the contrary, to pay all public charges in respect of the mortgaged property, when the mortgagee is not in possession. Not only the mortgagee, but any one claiming through him, is entitled to the benefit of this covenant, but the purchaser of the equity of redemption from a mortgagor is not a party to such a covenant, and there is no obligation on him to pay the public charges accruing due in respect of what he has purchased, though it may be to his interest to do so and avert a revenue sale of the mortgaged property.

Where a person purchased the equity of redemption in a portion of the mortgaged property, but before the revenue patta was issued in his name in respect of the portion sold, that portion was re-sold by the revenue authorities, owing to a default in the payment of revenue in respect of the remaining portion of the mortgaged property, and purchased again by the purchaser of the equity of redemption in the portion sold, the purchaser has absolute rights over the portion purchased and is entitled to hold it free of the mortgage, and the *puisne* mortgagee cannot proceed upon that portion.

Renga Srinivasachari v. Gnanaprakasa Mudaliar, 2 M.L.T. 36=30 M. 67.

SUBRAMANIA AYYAR and MILLER, JJ.

- (10) *Execution of decree based on—Sale of one of several mortgaged properties—Purchase by decree-holder of one of several mortgaged properties—Contribution in execution-proceedings, not allowable.*

A judgment-creditor, in execution of a mortgage-decree, which directs the sale of several properties, is entitled to execute the whole decree by sale of any of the properties, even though he himself purchased some of the

Mortgage.—(Continued).

—1.—(General)—(Continued).

properties, in execution of another mortgage-decree, against the same judgment-debtor. Any question of contribution which may arise by reason of the purchase by the decree-holder of some of the mortgaged properties, must be worked out, not in execution-proceedings, but in a separate suit properly framed, and in the presence of all the necessary parties (a). **Ameer Chand v. Bakshi Shiva Persad Singh**, 4 C.L.J. 573 = 34 C. 18.

RAMPINI and MOOKERJEE, JJ.

References :—(a) 4 C.L.R. 154, *App.*, 4 C.L.J. 195 and 4 C.L.J. 317, *doubted*.

- (11) *Suit to enforce a mortgage—Minor's property, mortgage of, by his natural and de facto guardian—Minor's property, if and when liable for the mortgage-debt—Benefit of the minor—Loan raised on mortgage to save ancestral property—Legal necessity—Interest, liability to pay, at the contract rate—Interest, reduction of, when allowable—Compound interest, when improper.*

The natural guardians of infant co-sharers are justified in joining with the male members of the family to raise a loan for the preservation of the family properties, even though the power of the guardians of the infants is a limited and qualified power. The loan in such a case is an absolute necessity, and not a merely voluntary act of speculation, and the mortgage of the infants' properties is binding upon the shares of the infants (a).

It is for the creditor to shew that the rate of interest charged was one of necessity or of clear expediency for the benefit of the infant's estate, and, in the absence of proof of such necessity or expediency, nothing more than the ordinary rate of interest upon loans on good security can be allowed (b).

In so far as the shares of the mortgagors, other than the infants, are concerned, interest must be allowed at the contract rate (c). **Abhiram Pal v. Mukunda Lal Dutt**, 5 C.L.J. 542.

RAMPINI and MOOKERJEE, JJ.

References :—(a) 6 M.I.A. 393, *R*; 20 W.R. 38, *Distd.* (b) 12 I.A. 47; 11 C 379; 18 I.A. 1; 18 C. 311, *R. and F.* (c) 31 C. 233, *referred to*.

- (12) *Joinder of parties for suits on mortgage—Transfer of Property Act, S. 85.*

S. 85, Transfer of Property Act, lays down that, subject to the provisions of S. 437, Civ.

Mortgage.—(Continued).

—1.—(General)—(Continued).

Pro. Code, all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit relating to such mortgage, provided that the plaintiff has notice of such interest. Though this section is not in force in the mofussil in Lower Burma, it lays down a general rule of law that should be followed, in order to avoid needless litigation and multiplicity of suits. **Tha Kaing v. Ma Htaik**, 2 L.B.R. 241.

HARTNOLL, J.

References :—2 U.B.R. (1892-96), 581 and 586, 3 L.B.R. 15, 18 A. 109, *R*.

- (13)—*Rights of mortgagee—Liability of mortgagor—Personal covenant.*

The promise to repay the mortgage money carries with it a personal obligation.

Where there was no express or implied covenant that the mortgage money should be realised from the mortgaged property alone, nor was there any distinct provision in the deed, as to the precise remedy of the mortgagee, if the mortgagor failed to repay the amount as promised :

Held, the remedy of the mortgagee was not restricted to the mortgage property only. **Bhugwan Das Marwari v. Parmishwari Prasad Singh**, 5 C.L.J. 287.

GHOSE and GORDAN, JJ.

References.—10 C. 740 = 11 I.A. 82; 16 C. 540, *R*.

- (14)—*Prior and subsequent incumbrances—Sale under decree on prior mortgage—Subsequent suit for sale in satisfaction of puisne mortgages.*

Semle that a mortgagee, who holds several mortgages from the same mortgagor over the same property, cannot, after obtaining a decree for sale on his first mortgage, bring the mortgaged property to sale, notifying the existence of the other mortgages, and then, when the property has been sold, institute a fresh suit for sale of the same property, on the basis of the puisne mortgages. **Godha Shukul v. Salaka Kunwar**, A.W.N. (1907), 83 = 4 A.L.J. 253.

STANLEY, C.J. and BURKITT, J.

- (15) *Contemporaneous deed—Sale and agreement to reconvey—Transaction whether mortgage—Intention—Date of repayment—Mortgage by conditional sale—Transfer of Property Act (IV of 1882), S. 58 (c).*

Mortgage.—(Continued).**1.**—(General)—(Continued).

On the construction of two contemporaneous documents, one of which purported to be a deed of sale, and the other provided that, on the vendor repaying the purchase-money mentioned in the deed of sale, with costs, within a fixed period, the vendee would return the land, and in case he did not do so, the vendor would deposit the money in Court, and take possession:

Held—that the two documents together did not constitute a mortgage (a).

A certain date of payment is an essential element of a mortgage by conditional sale. **Kinuram Mondol v. Nitye Chand Sirdar**, 11 C.W.N. 400=6 C.L.J. 208.

MACLEAN, C.J., and HOLMWOOD, J.

References.—(a) 12 A. 387, F. 4 C.W.N. 153 = 22 A. 149, Dis.

(16) *Prior and puisne mortgage—Purchase by each at sale on his mortgage—Rights inter se—Suit for possession by prior mortgagee—Maintainability—Right of puisne mortgagee and purchasers not made parties in mortgage suit to redeem—Partial redemption—Redemption, price of—Mode of calculation—Interest, rate of—Payments made by subsequent mortgagee to save property from rent sale, if to be taken into account—Contract Act (IX of 1872), S. 69—Bengal Tenancy Act (VIII of 1885), S. 171.*

A first mortgagee obtained a decree for sale of the mortgaged properties and purchased the same in execution, but, when he proceeded to take possession, was successfully resisted (i) by a second mortgagee, who had meanwhile sued on his mortgage, obtained a decree and purchased some of the properties in execution, and (ii) by certain other persons, who had purchased some of the other properties from the mortgagor. None of these had been made parties in the first mortgagee's suit, the latter not having had notice of their interest in the mortgaged properties.

Held—that it was not obligatory on the first mortgagee to institute a fresh suit for sale on his mortgage against these persons, and a suit for recovery of possession of the properties, on the basis of his purchase, was maintainable (a).

That, if the defendants wanted to retain possession, they must redeem the plaintiff, but as the plaintiff was both mortgagee and purchaser, the defendants were not bound to

Mortgage.—(Continued).**1.**—(General)—(Continued).

redeem the entire mortgage, but only to the extent of the properties purchased by them (b).

That, to redeem the plaintiff, it was not sufficient for the defendants to pay a proportionate share of the purchase-money paid by him. The amount payable must be calculated on the basis of the plaintiff's mortgage. But inasmuch as the plaintiff had already enforced that mortgage, and the mortgage-debt had been thereby converted into a judgment-debt, he was entitled to the contract rate of interest, only up to the date of the decree in the previous suit, and interest at the Court rate subsequent thereto up to the date of payment, to be fixed by the decree in the present suit (c).

Held—that, in taking accounts, credit ought not to be given to the defendants for payments alleged to have been made under S. 171, Bengal Tenancy Act, to save the properties from sale, in execution of a rent decree, inasmuch as the first mortgagee was not bound by law to pay the amount, within the meaning of S. 69 of the Contract Act (d). **Gangadas Bhattar v. Jogendra Nath Mitter**, 11 C.W.N. 403=5 C.L.J. 315.

MOOKERJEE and HOLMWOOD, JJ.

References.—(a) 9 C.W.N. 728, = 32 C. 891, F. 21 A. 201, 22 A. 394, R. (b) 2 C.L.J. 202 and 7 C.W.N. 728=30 C. 755, R. (c) 10 C.W.N. 592=33 C. 590; 11 C.W.N. 249=5 C.L.J. 106, F. 8 C. 79 (88), not followed; 16 I.A. 129=17 C. 23, 17 I.A. 201=18 C. 164, 21 I.A. 1=21 C. 366, R. (d) 22 C. 800, R.

(17) *Prior mortgage—Puisne mortgage—Suit by prior mortgagee in which puisne mortgagee not a party—Decree—Execution—Sale in execution—Rights of the puisne mortgagee.*

Where a prior mortgagee sues his mortgagor, for sale of the mortgaged property, without making a puisne mortgagee a party to the suit, the latter is, in no way, affected by the suit or its results. Thus, if the property is brought to sale in execution of the decree, and is bought by a third person, the puisne mortgagee has against him precisely the same rights as he had collectively against his mortgagor and the prior mortgagee, *viz.*, he may sue to redeem the purchaser as mortgagee, or thereafter as mortgagor to foreclose, or suffer himself to be redeemed by

Mortgage.—(Continued).

——1.—(General).—(Continued).

him. **Pandurang v. Sakharchand**, 8 Bom. L.R. 861 = 31 B. 112.

RUSSELL, AG. C.J. and BEAMAN, J.

(18) *Non-payment of consideration agreed, effect of.*

Failure or delay in payment of full consideration, either to the mortgagor or to a prior incumbrancer, after such payment has been demanded by the mortgagor, avoids the mortgage and destroys the mortgagee's lien and right to possession even on subsequent tender of the unpaid consideration, in the absence of a specific contract postponing payment, it being immaterial whether the failure or the delay has or has not caused inconvenience or loss to the mortgagor. In the absence of express stipulation postponing payment, it will be presumed that payment is intended to be made immediately or within reasonable time, according to the circumstances of each case. **Gokal Chand v. Rahman**, 59 P.R. 1907(F. B.).

READ, ROBERTSON and LAL CHAND, JJ.

References:—16 P.R. 1884, *Diss*; 153 P.R. 1882, 27 P.R. 1886, 100 P.R. 1889, 103 P.R. 1906, *R*.

(19) *Usufructuary mortgage—Suit for declaration that a mortgage is nominal, fraudulent, collusive, without consideration, and inoperative—Co-defendants—Res judicata—Civil Procedure Code (Act XIV of 1882), S. 13—Appeal, Court of, not deciding a matter—Decision, effect of—Possession and mesne profits, suit for—Conversion of suit for possession into one for redemption, if and when permissible—Recital in mortgage deed as to consideration—Evidence, admissibility in—Onus.*

When the decision of a lower Court is taken on appeal to a superior tribunal, and that tribunal, for any reason, does not think fit to decide the matter, it is left an open question (a).

If the appellate Court declines to decide an issue and disposes of the case on other grounds, the judgment of the first Court upon that issue is no more a bar to a future suit, than it would be, if that judgment had been reversed by the Court of appeal (b).

A decision does not operate as *res judicata* between co-defendants, unless it is established that there was a conflict of interest amongst the defendants, that the adjudication between the defendants was necessary to give the

Mortgage.—(Continued).

——1.—(General).—(Continued).

appropriate relief to the plaintiffs and that the judgment did define the real rights and obligations of the defendants *inter se* (c).

As against persons, who were not parties to a mortgage transaction, the recital in the mortgage deed that the consideration has been paid is no evidence, and the *onus* is upon the mortgagees to prove affirmatively the reality and necessity of the transaction (d).

As against the mortgagor, on the other hand, the recital in the deed is weighty evidence, and the *onus* lies upon the mortgagor to establish that the statement contained in the deed is untrue. What a party himself admits to be true may reasonably be presumed to be so, but the party may prove the statement to have been mistaken or untrue (e).

Where a plaintiff has rested his case upon fraud, when the case of fraud has failed, he cannot be permitted to support it upon an entirely different and inconsistent ground. Although, therefore, a suit, brought as one for possession, may, in the discretion of the Court, where the circumstances of the case permit it, be converted into one for redemption, on the assumption that the mortgage was valid and binding, a plaintiff must ordinarily succeed on the case he has made in the plaint and, unless there are special circumstances, an action instituted for purposes absolutely inconsistent with redemption cannot be converted into an action to redeem (f). **Ghurphakni v. Purmeshar Dayal Dubey**, 5 C.L.J. 653.

MOOKERJEE and HOLMWOOD, JJ.

References:—(a) 8 C. 631, *R*. (b) 6 B. 110; 7 C. 381, *R*. (c) 31 C. 95; 5 C.L.J. 611, *R*. (d) 6 C. 268; 17 A. 428, *R*. (e) 6 M. and W. 664; 34 I.A. 27, *R*. (f) 5 C.L.J. 527; 3 C.W.N. 325; 14 M.I.A. 53; 1 H.L.C. 605; 2 Phill. 310; 1 K. and J. 671, *R*.

(20) *Suit by mortgage without making person in possession a party to suit—Purchaser in execution sale—Suit for possession by purchaser, maintainability of.*

The plaintiff purchased certain property in execution of a mortgage decree for sale obtained by the mortgagee against the mortgagor. After the mortgage, but before the suit thereon, the mortgagor assigned all his rights in the mortgaged property to certain persons, who were not made parties to the suit on the mortgage.

Mortgage.—(Continued).

——1.—(General).—(Continued).

The purchaser at auction-sale sued for possession against the assignees of the mortgagor. *Held*, that the suit for possession would not lie, as the only right purchased by the plaintiff was the right of the simple mortgagee, viz., the right to enforce a sale. **Kanaran v. Unnooll**, 17 M.L.J. 481.

BENSON and WALLIS, JJ.

References:—19 A. 541, F; 16 B. 486, 10 B. 88, D.

(21) *Sale under first mortgage—surplus sale proceeds—second mortgagee entitled to—appeal against order awarding surplus proceeds—Practice—Appeal treated as revision—Civ. Pro. Code, S. 244.*

Two brothers, K and T, mortgaged their property to B. K then mortgaged his share to B. T's interest passed to other persons. B brought a suit for sale upon his first mortgage and obtained a decree. The sale of the property satisfied the first mortgage and left a balance. B applied for half the money so left, as a second mortgagee of K's share. The first Court adjudicated upon the rights of parties and awarded half to B and half of the money to transferees of T's share. The lower appellate Court reversed the decree. *Held* that B was entitled to half of the surplus sale proceeds as a second mortgagee of K's share (a).

Held, also, that the more regular procedure for the first Court would have been to refer the rival claimants of the money to a civil suit to establish their respective rights.

Held, further, that there was no question relating to the execution, discharge or satisfaction of the decree within the meaning of S. 244, C.P. Code, as between the decree-holder or his representative on the one side, and the judgment-debtor or his representative on the other, and no appeal lay from the order of the Court of first instance.

Appeal treated as revision and followed. **Bakhtamar Lal v. Baru Mal**, 4 A.L.J. 492 = A.W.N. (1907), 201.

BANERJI, J.

Reference:—(a) 18 B. 681, R.

(22) *Puise mortgage obtaining a decree for sale after redeeming a prior usufructuary mortgage, effect of—whether objection could be raised in execution.*

Mortgage.—(Continued).

——1.—(General).—(Continued).

Where a subsequent mortgagee obtains a decree for sale upon his simple mortgage, on condition of his redeeming a prior usufructuary mortgage, which he redeems and obtains possession, the judgment-debtor is not competent to object to the sale on the ground that, being in possession of the property as a usufructuary mortgagee, he could not sell the property in execution of his simple mortgage. **Jai Gobind Tewari v. Pateeri Partab Narain Singh**, 4 A.L.J. 765 = A.W.N. (1907), 286.

KNOX, J.

References:—26 A. 14, 25 A.W.N. 11, D. The rule laid down in 13 A. 432 should not be extended.

(23) *Purchaser in execution of mortgage-decree—Previous purchaser of mortgagor's right not made a party to the mortgage suit, right of.*

A purchaser in execution of a mortgage-decree has no right to retain possession of the property, obtained through Civil Court, against a purchaser of the equity of redemption, who was not a party in the suit on the mortgage, and who had obtained and remained in possession till the sale in execution of the decree in the mortgage suit (a). **Habibullah v. Jugdeo Singh**, 6 C.L.J. 609.

RAMPINI and BRETT, JJ.

References:—(a) 24 W.R. 94; (1891) A. C. 69, 8 C. 79, D.

(24) *Estoppel—Prior mortgagee, no party to a suit on a subsequent mortgage—Property advertised for sale as free from incumbrance—Prior mortgagee bidding for it without notifying his mortgage.*

M was a prior mortgagee of the property in dispute. R, a subsequent mortgagee, brought a suit without making M a party and obtained a decree. The property was advertised for sale as without any incumbrance. M was present at the time of sale and bid for the property, but did not notify his own claims. *Held*, that he was estopped from disputing the claim of the purchaser in execution of the subsequent mortgage decree. **Mauji Ram v. Moohan Singh**, 4 A.L.J. 709 = A.W.N. (1907), 278.

GRIFFIN, J.

Reference:—9 A. 418, D.

(25) *Mortgage security, suit to enforce—Partition, subsequent, effect of, on the securities*

Mortgage.—(Continued).

——1.—(General).—(Continued).

—Mortgagee, right of, to enforce security—Purchasers of equity of redemption from mortgagors, right of—Priority—Subrogation—Substituted security, principles for ascertainment of—Release of lien by mortgagee, effect of—Release of one joint-mortgagor, effect of—Redemption of share of mortgage by other joint-mortgagor.

The mortgagee of an undivided share in joint-property is entitled only to property allotted on partition to the mortgagor, if the partition was fair and equal and is not vitiated by fraud, and he is entitled to proceed against what may be called the substituted security (a).

The principles on which substituted securities should be ascertained, discussed and explained.

A mortgagee, who has a security upon two or more properties, which he knows to belong to two different persons, cannot release his lien upon one, so as to increase the burden upon the others, without the privity and consent of the persons affected. The purchasers of the properties not released are entitled to insist that no more than a proportionate share of the mortgage debt shall be levied upon the properties in their hands (b).

Where a mortgagee has, gratuitously or otherwise, released one of the joint-mortgagors and his share of the property, the mortgage-debt is split up, and redemption of a share becomes permissible, so that the other joint-mortgagor is at liberty to redeem his share on paying a proportionate part of the mortgage money.

The principles upon which the right to claim subrogation arises explained (c). **Hakim Lal v. Ram Lal**, 6 C.L.J. 46.

MOOKERJEE and HOLMWOOD, JJ.

References:—(a) 1 I.A. 106=21 W.R. 233, R; (b) 1 C.L.J. 337, 2 C.L.J. 202, 33 C. 613 (622)=8 C.L.J. 576, 33 C. 890, R; 25 A. 79, 28 A. 174, 29 M. 217, Diss; 15 B. 186, 5 A. 257, R; (c) 5 C.L.J. 611, F.

(26) Mortgage decree, whether attachment necessary for execution of—Attachment of property—Application for removing attachment—Civ. Pro. Code, S. 278.

It is not necessary for a mortgage decree-holder to attach the property which forms the subject of the mortgage.

But even if such decree-holder has taken out an attachment which it is not necessary for

Mortgage.—(Continued).

——1.—(General).—(Continued).

him to do, S. 278, C.P.C., is not applicable; and so, no application will lie under that section for the removal of the attachment. **Gobalu v. PO Hla**, 4. L.B.R. 82.

HARTNOLL, J.

Reference:—4 C. 631, R and F.

(26-a) Mortgage by Hindu widow without legal necessity—Mortgagee spending money on repair of mortgaged property—Suit by reversioner—Right of mortgagee to recover money—See HINDU LAW (WIDOW), No. 14, 9 Bom. L.R. 1181.

(27) Mortgage by guardian—Belief of mortgagee in the existence of reasonably credited necessity—See ACT V OF 1881 (PROBATE and ADMINISTRATION), No. 6, 2 M.L.T. 343.

(28) Mortgage deed, suit on—Denial of execution and passing of consideration—Plea set up by mortgagor or third person—Difference in burden of proof—See BURDEN OF PROOF, No. 4, 6 C.L.J. 659.

(29) Mortgage deed—Construction—Liability of mortgagee to pay increased Government revenue—See TRANSFER OF PROPERTY ACT, No. 45, 17 M. L.J. 517.

(30) Misjoinder of parties and causes of action—Parties to mortgage suit—See CIV. PRO. CODE, No. 53, 17 M.L.J. 615.

(31) Application of principle of subrogation—See SUBROGATION, No. 2, 6 C.L.J. 184.

(32) Mortgagor's personal liability for costs—See TRANSFER OF PROPERTY ACT, No. 57, 17 M.L.J. 317.

(33) Limitation applicable to simple and English mortgages—See LIMITATION ACT, No. 104, 11 C.W.N. 1005.

(34) Adverse possession by mortgagee during continuance of mortgage—See MAHOMEDAN LAW (SUCCESSION), No. 3, A.W.N. (1907), 221.

(35) Void assignment of mortgage—Suit by assignor for recovery of money received by assignee—Limitation Act—Article applicable—See LIMITATION ACT, No. 70, 17 M.L.J. 452.

(36) Mortgage of undivided interest of a Hindu co-parcener—Right of mortgagee to a declaration that he has a lien over the mortgaged share—Remedy of mortgagee—See HINDU LAW (JOINT FAMILY), No. 2, 10 O.C. 289.

(37) Mortgagor, duties of, when taking a mortgage from manager of joint Hindu family,

Mortgage.—(Continued).

—1.—(General).—(Continued).

when there are minors in the family—See **HINDU LAW (JOINT FAMILY)**, No. 3, 9 Bom. L.R. 1114.

(38) Mortgage by son of the owner of the holding while owner alive—Effect of mortgage after owner's death—See **ACT VIII OF 1865 (BENGAL RENT RECOVERY)**, No. 1, 6 C.L.J. 43.

• (39) Decree for sale on a—Rate of interest after date fixed for payment—See **TRANSFER OF PROPERTY ACT**, No. 52, A.W.N. (1907), 60.

(40) Objection by party defendant to sale of property ordered by mortgage decree to be sold—See **CIV. PRO. CODE**, No. 127, 16 M.L.J. 545=30 M. 26.

(41) Decree for possession of equity of redemption—Decree-holder wrongfully obtaining possession of property instead of equity of redemption—Suit by mortgagee claiming restitution of property—See **CIV. PRO. CODE**, No. 112, 5 P.R. 1907.

(42) Sale of the property after the usual period of six months—Personal liability for the unpaid balance—Mortgage decree should only reserve liberty to apply—Attachment of other property under personal decree—Son born to mortgagor after the sale of the mortgaged property, but before the sale of other property under the personal decree—Son entitled to have exempted his share in the property from sale—See **TRANSFER OF PROPERTY ACT**, No. 62, 9 Bom. L.R. 199.

(43) Property liable to be sold in execution is subject to mortgage—Mortgagee's right to have property sold free of mortgage—See **CIV. PRO. CODE**, No. 163, 8 L.B.R. 275.

(44) Execution sale of property "free from mortgage" and "subject to mortgage"—Procedure—See **CIV. PRO. CODE**, No. 167, 3 L.B.R. 258.

(45) Compromise decree giving mortgage-decree for debt not secured by mortgage, validity of—Public policy—Minority of some of the defendants—See **CIV. PRO. CODE**, No. 213, 17 M.L.J. 200.

(46) Portion of mortgaged lands declared not liable for mortgage debt—Appeal against such mortgage decree—Mortgage-debt greater than the value of exonerated property—Value of appeal—See **COURT FEES ACT (VII OF 1870)**, No. 17, 1 M.L.T. 311 (F.B.)=16 M.L.J. 458=30 M. 96.

Mortgage.—(Continued).

—1.—(General).—(Continued).

(47) Sale in execution—Purchase of undivided share in property partly incumbered—Presumption—See **EXECUTION OF DECREE**, No. 8, A.W.N. (1907), 131.

(48) Application for execution—Mortgage decree—Mortgagee in possession—Accounts—Limitation—See **LIMITATION ACT**, No. 126, 5 C.L.J. 289.

(49) Sale of mortgaged property—Price applied to payment of mortgage debts—Payment not made by purchaser but by mortgagor—See **TRANSFER OF PROPERTY ACT**, No. 44, A.W.N. (1907), 85.

(50) Decree for sale on a mortgage—Property ordered to be sold not susceptible of sale in part—Abandonment of claim to sell such part—See **TRANSFER OF PROPERTY ACT**, No. 59, A.W.N. (1907), 83.

(51) Mortgage of occupancy rights—Rights not saleable—Personal decree ought not to be given—See **TRANSFER OF PROPERTY ACT**, No. 60, 4 A.L.J. 157.

(52) Attesting witness to mortgage deed not called—Admissibility of deed in evidence to enforce personal covenant—See **EVIDENCE ACT**, No. 12, 2 M.L.T. 175.

(53) Mortgage of impartible zemindari by holder and members of his family standing in the line of succession to the zemindari—*Spes successionis*—See **TRANSFER OF PROPERTY ACT**, No. 8, 2 M.L.T. 167.

(54) Zuri-Peshgi lease—possession not delivered to mortgagee—Suit for recovery of possession dismissed—Suit for compensation—See **LIMITATION ACT**, No. 83, 4 A.L.J. 249.

(55) Mortgage by mortgagee of his rights as such, but without assignment—Rights of sub-mortgagee and of puisne mortgagee—Meaning of "mortgaged property"—See **SUB-MORTGAGE**, No. 1, 4 A.L.J. 273.

(56) Portion of mortgaged property acquired for public purposes—Mortgagee's right to compensation awarded—See **ACT I OF 1894 (LAND ACQUISITION)**, No. 16, 17 P.R. 1907.

(57) Suit in *forma pauperis*—Property of defendant sold to realise Court fee—Property sold subject to mortgage—Mortgagee's rights—See **FORMA PAUPERIS**, No. 3, A.W.N. (1907), 157.

Mortgage.—(Continued).**1.—(General).—(Concluded).**

(58) Mortgages executed on the same day—Priority—Joint tenancy or tenancy in common when neither proved to have been executed before the other—See APPELLATE COURT, No. 1, 11 C.W.N. 732.

(59) Subrogation when arises—First mortgagee not necessary party in suit to enforce second mortgage—See SUBROGATION, No. 1, 5 C.L.J. 611.

(60) Suit by Otti or usufructuary mortgagee who fails to get possession of the mortgaged property—Limitation—See LIMITATION REGULATION (TRAVANCORE), No. 3, 22 T.L.R. 213 (F.B.).

(61) Suit to set aside sale of property subject to mortgage—Value of suit—Jurisdiction—See VALUATION OF SUITS, No. 5, 22 T.L.R. 86.

2.—(Anomalous Mortgage).

(1) Mortgage of a usufructuary character—Personal covenant to pay—Mortgagee's right to sue for sale—See TRANSFER OF PROPERTY ACT, No. 41, 10 O.C. 14.

3.—(Conditional Sale).

(1) Reference by Civil Court to Collector under S. 9, sub-section 3 of Punjab Alienation of Land Act (XIII of 1900)—Collector declined to interfere—Proper procedure—Regulation XVII of 1806—Suit by mortgagee for possession.

By a mortgage deed, the mortgagors, agriculturists, agreed that, if the total sum due, principal and interest, was not paid off on the expiry of five years from the date of the deed, the land should be deemed as sold to mortgagee. Before the five years' term expired, the Punjab Alienation of Land Act came to force. The mortgagee applied to the District Court for issue of notice of foreclosure under Reg. XVII of 1806. The Judge referred the matter to the Collector under S. 9 of Act XIII of 1900. The Collector, on the mortgagors' raising objection to the new mortgage proposed by him, decided that nothing further could be done and so returned the paper to the District Judge. The notice of foreclosure and the year of grace having expired, the mortgagee brought a suit for possession as owner.

Held, that the Punjab Land Alienation Act had not acted as a bar for the completion of the foreclosure under Reg. XVII of 1806, and the Civil Court was not bound, under S. 9, sub-

Mortgage.—(Continued).**3.—(Conditional Sale).—(Continued).**

section 8 of the Act, to refer the matter, after a suit has been filed, to the Collector, as the mortgagee had become *ipso facto* owner of the property by purchase, although he had still to sue for possession.

When the Collector, acting under S. 9 (2) of the Act, declines to interfere, he thereby sanctions the permanent alienation. This is specially so, when, by his non-interference, the proprietary right in the land will shortly pass to a non-agriculturist mortgagee.

Conditions of sale are only absolutely and necessarily null and void by the operation of the Act, if occurring in mortgages after the commencement of the Act. **Bichha Lal v. Gumani**, 93 P.R. 1907.

CHATTERJEE and JOHNSTONE, JJ.

(2) Deed executed prior to Transfer of Property Act—Special Covenant to pay costs separately—Enforceability of such Covenant.

Where the defendant executed a mortgage by conditional sale, before the Transfer of Property Act came into force with a special covenant that the costs of the foreclosure suit shall be "separately paid by him", held:—

(1) that there is nothing in S. 86 of the Transfer of Property Act to shut out the discretion of the Court in allowing costs, or in making the mortgagor personally liable for them, which is conferred by S. 220, C.P. Code (a).

(2) that the special agreement of the parties is expressly saved by S. 2 of the Transfer of Property Act and that the parties will be bound by that agreement. **Dhoundu Pandit v. Mahant Daulatpuri**, 3 N.L.R. 97.

DRAKE-BROCKMAN, O.J.C.

References:—(a) 14 C. 185, 11 A. 179, 13 C. P.L.R. 74, 12 C. P. L.R. 78, F.

(3) Foreclosure by mortgagee under Regulation XVII of 1806, suit for proprietary possession subsequent to, cause of action for, when arises limitation.

Where a mortgage-deed provided for redemption within two years, and on default, the mortgagee foreclosed the mortgage, allowing one year of grace, under Regulation XVII of 1806, on subsequent proceedings by the mortgagee for proprietary possession, it was held, that there was no time-limit for such an application made under the Foreclosure Regulation and that even assuming that he had only twelve

Mortgage.—(Continued).**—3.—(Conditional Sale).—(Concluded).**

years, from the due date within which to institute such proceedings, the period would begin to run only from the date of the expiry of the year of grace when alone the mortgagor's right to possession first determined. *Sek Chand v. Sohel Singh*, 65 P.R. 1906=72 P.L.R. 1907.

LAL CHAND, J.

References:—90 P.R. 1895 (F.B.), F. 35, P. R. 1899, D.

(4) Valid notice of foreclosure, under Reg. XVII of 1806—Objections to notice made on appeal for the first time—Validity—See REG. XVII of 1806 (BENGAL), No. 1, 105 P.R. 1907.

(5) Mortgage by member of agricultural tribe—Reference to Deputy Commissioner—See ACT XIII OF 1900 (PUNJAB ALIENATION OF LAND), No. 3, 4 P.R. 1907=20 P.W.R. 1907.

(6) Money decree on mortgage—Sale of equity of redemption—Mortgagee's title on purchase—See TRANSFER OF PROPERTY ACT, No. 69, 157 P.L.R. 1906=2 P.R. 1907.

(7) Sale and agreement to re-convey—Date of repayment essential—Transaction whether mortgage—Intention of parties—See MORTGAGE (GENERAL), No. 15, 11 C.W.N. 400.

—4.—(English).

(1) Power of sale, sale under—Covenant by mortgagor to waive irregularity in sale—Purchaser buying with notice of irregularity—Title of purchaser—See TRANSFER OF PROPERTY ACT, No. 2, 11 C.W.N. 1109. (P.C.).

—5.—(Equitable).

(1) *Deposit of title deeds of immoveable property—Promissory note—Onus of proving non-receipt of consideration and payment of interest—Enforcement of exorbitant rate of interest—Further interest on the amount decreed and costs allowed—Pleadings, fact alleged and not denied taken as admitted—Question of non-registration not arising—Act III of 1877, Ss. 17 and 19—Act XXVI of 1885, S. 118.*

Held that (a) in the case of a promissory note, the onus of proving non-receipt of full consideration and payment of interest thereon lies on the promisor; (b) a contract of paying interest at the rate of Rs. 36 per cent. per annum, entered therein, is enforceable, by law, and the rate cannot be reduced simply on the ground of its being exorbitant, and (c) that further interest at 12 per cent. per annum can

Mortgage.—(Continued).**—5.—(Equitable)—(Concluded).**

be allowed on the amount decreed and costs, from the date of the suit to the date of realization.

Held, also, that deposit of title deeds of immoveable property with the creditor, for the purpose of giving him the right of recovering his debt, in case of default, from the said property, creates an equitable mortgage in his favour, and is recognised and enforceable by law in India just like an ordinary mortgage.

Held, further, that (a) a fact alleged in the plaint, and not expressly denied by the defendant, is taken to have been admitted by the latter, and there is no necessity for the former to prove it; and that (b) the fact is also reduced to writing in a document of which registration is compulsory makes no difference and (c) the question of non-registration of the said document does not arise at all in such a case (a). *Gurditta Mal v. Gulam Ali*, 53 P.W.R. 1907.

RATTIGAN and SHAH DIN, JJ.

References:—(a) 2 P.R. 1902, D; 113 P.R. 1880, 17 A. 252, 1 B. 237, 3 B. 329, 10 B. 644, 14 B. 269, 3 C. 174, 13 C. 322, 33 C. 410, 7 B. L.R. 38 and 11 B.L.R. 405, R.

—6.—(Foreclosure).

(1) *Nature of proceedings between decree nisi and order absolute—Res judicata—Necessity for notice before passing order absolute—Setting aside ex parte order absolute—Extending time for payment—Burden of proof—Civ. Pro. Code, Ss. 108, 622, 647—Transfer of Property Act, S. 87.*

The proceedings between a decree nisi in a mortgage case and the order absolute are neither a continuation of a pending mortgage suit, nor are they proceedings in execution of a decree under the Civ. Pro. Code. The decree nisi in a mortgage suit is undoubtedly a decree which decides the suit as such, and it is, as regards the Court making it, a final adjudication upon all the issues raised in the suit, which it is necessary to decide for the purpose of determining the controversy between the parties, and those issues become *res judicata*, whether or not an order absolute is subsequently passed. Such proceedings are taken in accordance with the special provisions of the Transfer of Property Act and are absolutely independent of Chapter XIX, Civ. Pro. Code (a).

Mortgage.—(Continued).

6.—(Foreclosure).—(Continued).

When the holder of a decree *nisi* makes an application for an order under S. 87, Transfer of Property Act, the Court is bound by S. 647, C.P.C., to issue a notice to the opposite party, informing him of the fact that such an application has been made, and the date fixed for hearing the non-applicant against it. A notice is necessary, because, (1) S. 647 of the Code is a statutory provision, which, on an application under S. 87 of the Transfer of Property Act, requires procedure analogous to that prescribed for suits, as far as possible, and necessarily implies the issue of notice to the non-applicant; (2) In view of the above statutory provisions, no analogy can be drawn from the practice of the English Courts; (3) The decree *nisi* gives the judgment-debtor no notice of the date when an application is made for an order absolute on an allegation of non-payment. Such an application may not be made for months after expiry of the date fixed for payment, and it may be made notwithstanding payment, or in spite of some compromise. The judgment-debtor is, therefore, clearly entitled to appear and be heard in response to it (b).

If an order absolute is made *ex-parte*, the Court may, on grounds analogous to those stated in S. 108 of the Code, set it aside and resume the proceedings *inter partes*. It is also open to review and revision in the same way; and at least one appeal is generally allowed in respect of it.

Notice of proceedings for an order absolute is not, however, an invitation to redeem, nor is it a second decree *nisi* calling for redemption. The provisions of the law as to foreclosure absolute, following upon non-payment within the time limited, are imperative and can only be delayed, upon good cause shown by the party, who was given the right to redeem. Unless an extension of time is made upon good cause, the Court has no jurisdiction to refuse or even to delay the order absolute, and it equally has no jurisdiction to allow redemption after due date, without so extending the period originally fixed by it (c); and if the Court does so, it acts *ultra vires*, so as to justify interference under S. 622 of the Code.

The *onus* is on the judgment-debtor to show good cause for the extension of time. **Seth Bagwandas v. Shridhar**, 3 N.L.R. 55.

STANFORD, A.J.C.

Mortgage.—(Continued).

7.—(Foreclosure).—(Continued).

References:—(a) 2 N.L.R. 178, *Diss.*; 11 C.W.N. 156, *F.* (b) 9 C.P.L.R. 5; 29 C. 644, *Diss.* (c) 2 N.L.R. 137, *F.*

(2) *Promissory to re-pay mortgage money in instalments—Agreement to treat mortgage as sale in default of paying instalments—Application of Reg. XVII of 1806—Meaning of the term "stipulated period" in S. 8 of the regulation.*

Regulation XVII of 1806 does not apply to the case of a mortgage, in which there is no stipulated period for redemption, but there is a condition that the mortgage debt is to be re-paid in annual instalments, and that on default the land should be deemed to have been sold for the balance due at the time of default (a). The term "stipulated period" in S. 8 of the regulation means stipulated period for redemption, *i.e.*, the full term, on the expiry of which the mortgage money is payable, although the mortgagee may, on a default being made, sue to foreclose at an earlier period under the terms of the deed. A foreclosure notice issued before the expiry of the stipulated period is premature and useless (b). **Har Gopal v. Bhagwan Sahai**, 70 P.R. 1907.

CHATTERJI and JOHNSTONE, JJ.

References:—(a) 50 P.R. 1906, *F.* (b) 23 C. 228 (P.C.), *F.*

(3) *Regulation XVII of 1806—Foreclosure of mortgage—Proof of observance of conditions of Regulation—Effect of absence of notice of foreclosure.*

In order that a mortgagor, who has mortgaged certain land, by way of conditional sale, may be deprived of his right of redemption, by reason of the mortgagee having been foreclosed under the Regulation, the mortgagee, who relies on foreclosure proceedings having worked as forfeiture of the estate of the mortgagor, must prove affirmatively the due performance of every condition necessary to be established under the Regulation, before the foreclosure can attach upon such estate (a).

Where, therefore, the notice of foreclosure prescribed by the Regulation, which was alleged to have been issued to the mortgagor, was not on the record of the foreclosure proceedings, the non-existence of the notice is a fatal defect and the Court could not, on the strength of the order of the District Judge which showed that the mortgagor appeared in person before

Mortgage.—(Continued).

—5.—(Foreclosure).—(Continued).

him, and was warned that he would be precluded from raising any objection, if he did not redeem within one year, presume that notice has been issued to the mortgagor, and that it was accompanied by a copy of the mortgagee's petition for foreclosure and bore the seal and the official signature of the District Judge—a defect in any of these vitiating the foreclosure proceedings. **Sochet Singh v. Dial Singh**, 46 P.R. 1907.

SHAH DIN, J.

References:—(a) 16 P.R. 1888, 106 P.R. 1889, 24 P.R. 1895, 29 P.R. 1898, 48 P.R. 1902 and 71 P.R. 1203, R.

(4) Notice of foreclosure before period for repayment, whether valid and effective—Regulation XVII of 1806, S. 8, demand by mortgagee under, when should be made..

The question for consideration in this case was whether the notice of foreclosure issued to the mortgagor before the period for redemption with the year of grace actually expired was a valid notice so as to effect the foreclosure at the expiry of the year of grace. *Held*, the mortgage, not being redeemable, and the mortgagee not entitled to payment until after the expiry of the grace, any notice before such period could have no effect towards foreclosure.

Also the demand by the mortgagee provided for by S. 8, by Regulation XVII of 1806, can be made only after the mortgage money falls due.

The further contention in the case, that the regulation cannot extend the stipulated period for payment, was held untenable in view of S. 7 which refers to the year of grace as the "extended period" (a). **Sant Singh v. Jiwan Mal**, 119 P.R. 1906=81 P.L.R. 1907.

REID, C.J. & CHATTERJI, J.

Reference:—(a) 23 C. 228 (P.C.), *Id.*

(5) Foreclosure of mortgage by conditional sale—notification to mortgagor—See REGULATION XVII of 1806 (BENGAL), No. 5, A.W.N. (1906), 309.

(6) Person entitled to notice of foreclosure—Objection raised by mortgagor for want of notice to co-occupant—Pre-emption—See LAND REVENUE CODE (BERAR), No. 3, 3 N. L. R. 84.

(7) Foreclosure of mortgage by conditional sale—Limitation—See LIMITATION ACT, No. 6, 11 C.W.N. 959. (F.B.).

Mortgage.—(Continued).

—6.—(Foreclosure).—(Concluded).

(8) Requirements of valid notice in the case of foreclosure—See ACT XVIII OF 1876 (OUDH LAWS), No. 4, 10 O.C. 179.

—7.—(Redemption).

(1) *Usufructuary mortgage—Tender of money due by mortgagor, valid, effect of—Tender, if extinguishes security—Redemption, suit for—Nature and scope of suit—Decree, effect of—Mortgagee in possession, liabilities of—Damages, suit for, for wrongful detention of property—Mesne profits—Transfer of Property Act (IV of 1882), Ss. 76, 84, 89 and 92—Accounts, taking of—Res judicata, constructive—Defence which might and ought to have been taken in a former trial—Principle of the rule—Civ. Pro. Code, S. 13, Explanations II and III.*

A mortgagee who refuses a valid tender, does so at his risk; he does not thereby cease to be a mortgagee, and whatever is due to and from him, after the date of the tender, should be included in the accounts taken, in a subsequent suit for redemption.

In cases of legal or equitable mortgage, a tender properly made and improperly rejected, is not equivalent to payment, and neither extinguishes the mortgage debt, nor determines the mortgagee's property in the security. A proper tender will stop the running of interest, if the mortgagor keeps the money ready to pay over to the mortgagee, and does not afterwards make any profit out of it (a).

The essence of foreclosure and redemption suits is, that, in such suits, each party is entitled to enforce his rights; a plaintiff claiming foreclosure is bound, upon the accounts being taken, if the balance is against him, to pay that balance; on the other hand, a plaintiff claiming redemption, must submit to a decree for sale or foreclosure, if he makes default in payment; and to avoid a multiplicity of suits, it is necessary, under decrees for foreclosure or redemption that the accounts between the parties should be settled and discharged; if the balance is against any party, he must pay it (b).

In a redemption suit, the mortgagor is entitled, as in a question with his mortgagee, to have a general account taken of what is due upon the mortgage and the fact that the mortgagor then declared, in his pleadings, his intention of bringing a separate action for recovery of the profits received by the mortgagee

Mortgage.—(Continued).

—7.—Redemption.—(Continued).

after refusal of his tender, does not entitle him to maintain an action for damages for wrongful detention of property after the tender, which would have been wholly unnecessary, if the claim urged in the latter action had been put forward and given effect to in that litigation (c). **Satyabadi Behara v. Mussammut Hirabati**, 5 C.L.J. 192=34 C. 223.

MOOKERJEE and HOLMWOOD, JJ.

References :—(a) 7 W. R. 361, D., 25 B. 115, *Expt.*, and D., 21 C. 252, 21 A. 425, 4 C.P.L.R. 88, 12 C. 482, 17 C. 968, 19 C. 615, D. (b) 9 C. 377, 16 I.A. 107, 16 C. 682, R. (c) 20 C. 322, R., (1865) B.L.R. Sup. Vol. 109 (150), D.

- (2) *Mortgagee not put in possession entitled to claim interest—arrear of unpaid interest, to be paid at the time of redemption—Covenant to pay interest not recoverable out of the profits of the property.*

Held, that, where, in a mortgage deed, there was a distinct undertaking, on the part of the mortgagor, to pay any amount on account of interest, which was not recoverable out of the profits of the property, and the mortgagor failed to deliver possession of the property to the mortgagee, the latter was entitled to refuse redemption, until the whole of the interest due during such period was paid (a). **Phul Chand v. Mr. H. H. Sandilands**, 10 O.C. 29.

CHAMBER and EVANS, J. CS.

References :—(a) 17 B. 425 and 9 O.C. 144. D.

- (3) *Redemption, suit for, by father dismissed—Second suit by sons—Only sons' share redeemable—Hindu Law.*

A suit for redemption brought by the father of the plaintiffs was dismissed. Some time after, the sons brought this suit for redemption of the whole property, the mortgage having been satisfied from the usufruct. *Held*, that the plaintiffs were entitled to redeem their shares only, and not the share of their father. **Sundar Lal v. Chittar Lal**, 4 A.L.J. 17=29 A. 215=A. W.N. (1907), 25.

STANLEY, C.J., and KNOX, J.

- (4) *Purchase of a part of mortgaged property by mortgagee—right of one mortgagor to redeem his share only—Transfer of Property Act, 1882, S. 60.*

When the mortgagees purchase the equity of redemption in a portion of the mortgaged property, the integrity of the mortgage is broken

Mortgage.—(Continued).

—7.—(Redemption).—(Continued).

up, and one of the several mortgagors is entitled to redeem only his share of the mortgaged property (a). **Munshi v. Daulat**, 4 A.L.J. 74=A.W.N. (1907), 49=29 A. 262.

STANLEY, C.J., and BURKITT, J.

References :—(a) 13 M.I.A. 404, 2 A. 565 5 C.W.N. 83, R.

- (5) *Mortgage for 20 years—Right of mortgagor's representative to redeem before expiry of the term.*

A term of 20 years agreed upon between a mortgagor and his mortgagee is neither inequitable, nor one fixed without legal necessity and cannot be set aside as unenforceable, especially where the term was fixed by the mortgagor, in good faith, with due regard to his best interest and to that of his heirs; and the representative of the mortgagor cannot be allowed to redeem before the expiry of the term. **Puran Singh v. Kesar Singh**, 39 P.R. 1907.

JOHNSTONE and SHAH DIN, JJ.

References :—131 P.R. 1894, 6 P.R. 1902, 40 P.L.R. 1903, P.W.R. 152, 20 B. 677, 21 M. 110, R.

- (6) *Redemption, where mortgagor and mortgagee have both acquired interests in the mortgaged property—Mortgagor cannot redeem whole against the will of the mortgagee—Adverse possession of mortgagee.*

Held that, in a redemption suit, the general rule is that a person interested in part only of the mortgaged property may insist upon redeeming the whole of it, but where the mortgagee has acquired part of the mortgaged property, a purchaser of part only cannot redeem more than his own share, against the will of the mortgagee. **B. Mustafa Khan v. Shadi Lal**, 10 O. C. 81.

CHAMBER and SANDERS, J. CS.

References :—6 O.C. 223, 28 A. 1 (17) (P.C.), 6 O.C. 279, R; 13 M.I.A. 404, 2nd C.A. 180 of 1905, 2nd C.A. 382 of 1906, overruled.

- (7) *Mortgage-deed, construction of—Mortgagee accepting profits in lieu of interest, clauses as to, modified by a later clause providing for compound interest—Compound interest, liability for—Redemption, sum payable at the time of.*

A mortgage-deed, after providing for payment of interest annually and means for realizing the

Mortgage.—(Contin**—7.—(Redemption).**

same, stipulated that "if as a mark of favour the mortgagor lets the interest remain unrealized, the same shall be added to the principal and compound interest run thereon." There were two subsequent clauses, (6) "after taking possession, the mortgagee will be entitled to receive the net profits in lieu of interest and during the time of his possession, the interest and profits shall be deemed equal," (11) "if the profits do not cover the amount of interest, we the mortgagors will make good the deficiency from our pockets"—the deficiency, if not so made good, being made payable "with interest at the rate mentioned above at the time of redemption." The mortgagee took possession under the mortgage.

Held, that, although cl. (6) standing by itself might be construed as constituting an ordinary usufructuary mortgage, its *prima facie* meaning was qualified by cl. (11). The two clauses should be read together and the latter clause should not be rejected on the ground that it was inconsistent with the former. They both had the effect of making the principal money payable with compound interest, and, on the proper construction of the deed, the mortgagor was liable to pay compound interest on the amount of unpaid interest, which he had stipulated to pay under cl. (11). **Thakur Jawahir Sing v. Bameshwar Datt and others**, 10 O.C. 92=10 C.W.N. 266=1 M.L.T. 66=3 C.L.J. 354=28 A. 225 (P.C.).

LORD DAVEY, SIR ANDREW SCOBLE, SIR ARTHUR WILSON and SIR FORD NORTH.

(8) *Redemption—Time granted by first Court—Unsuccessful appeal.*

Where the defendant was allowed six months by the first Court to pay off a mortgage debt, and, upon appeal by the defendant, the appeal was dismissed:

held, that the six months' time allowed to the defendant should run from the date of the first Court's decree, and not of the appellate decree. **Fajjuddi Sardar v. Asimuddi Biswas**, 11 C.W.N. 679.

MACLEAN, C.J., and FLETCHER, J.

(9) *N.W.P. Tenancy Act (II of 1901), S. 20—mortgage of occupancy holding—Redemption of a prior valid mortgage—rights of mortgagees.*

A usufructuary mortgage of an occupancy holding was executed after the passing of the

Mortgage.—(Continued).**—7.—(Redemption).—(Continued).**

North-Western Provinces Tenancy Act. The mortgagee sued to redeem a prior mortgagee of the same holding, whose mortgage was executed before the passing of the Act. *Held*, that the mortgage, under which the plaintiff claimed, was invalid and unlawful, as contravening S. 20 of the Act, that the plaintiff had acquired no right under his mortgage and was not entitled to redeem the prior mortgagee, whose mortgage was valid under the law. **Banmali Pande v. Bisheshar Singh**, 3 A.L.J. 781=A.W.N. (1906), 300=29 A. 129.

STANLEY, C. J. and KNOX, J.

References:—26 A.W.N. (1906), 182=3 A.L.J. 476, F. 15 A. 219, 26 A. 78, R.

(10) *Kanom mortgage, incidents of—Suit to redeem—Renewal clause, construction of—Kanomdar holding over, effect of—Effect of accepting renewal fee from Kanomdar—Transfer of Property Act, Ss. 59, and 98—Covenant for perpetual renewal of lease.*

A *kanom* is an anomalous mortgage within the meaning of S. 98, Transfer of Property Act, with certain well-known incidents attached to it by the customary Law of Malabar (a). In such a mortgage, the rights and liabilities of the parties should be determined by their contract as evidenced in the mortgage-deed and, so far as such contract does not extend, by local usage. Where, in a *kanom*, the demisor says "you shall obtain a renewed demise on the expiration of every 12 years" and, in the corresponding *kychit*, the demisee says "I shall obtain a renewed demise on the expiration of every 12 years," *held*, that this stipulation was inserted for the protection of the demisor, not for the benefit of the demisee, and that the demisor does not thereby bind himself to grant a renewal every 12 years.

The receipt of a renewal fee would evidence an agreement for a renewed *kanom* and such an agreement, accompanied by possession would in equity be considered as placing the *kanomdar* in the same position as if he had obtained a renewed *kanom*. This principle of equity can, however, only be given effect to in this country, so far as it is compatible with the Transfer of Property Act. A *kanom* being a mortgage, it requires registration under S. 59 of the Act. Consequently, possession under an agreement for a mortgage cannot be relied on, in the absence of a registered agreement, and the

Mortgage.—(Continued).

—7.—(Redemption).—(Continued).

demisee, even if in possession, cannot resist the suit for redemption, unless he has actually obtained a renewed demise duly registered (b).

Per WALLIS, J.—A *kanom* partakes of the nature of a lease as well as of a mortgage. The validity of a covenant for perpetual renewal in a lease having been long established in England, such a covenant in a *kanom* may be enforced, at any rate, in the case of *kanoms* entered into since the coming into force of the Transfer of Property Act. Such a covenant is, however, a serious derogation from the rights of the landowner, whether he is regarded as mortgagor or as lessor. And the authorities have imposed upon any one claiming such a right the burden of strict proof and are strongly against inferring it from any equivocal expressions, which may fairly be capable of being otherwise interpreted.

It cannot be contended that, the *kanomdar* having been allowed to hold over after the expiration of the *kanom* period, he must be treated as a tenant from year to year and cannot be ejected except on due notice. Although the *kanom* may partake of the nature of a lease, that is no reason for importing into it the rules of English law as to holding over. **V. Y. L. Gopalan Nair v. P. Kunhan Menon**, 2 M.L.T. 131 = 17 M.L.J. 189 = 30 M. 300.

BENSON and WALLIS, JJ.

References:—(a) 27 M. 26, R; (b) 29 M. 336 (F.B.), F; (c) 3 M. 382, 16 M.L.J. 462, 24 M. 449, L.R. 9 A.C. 844, S. A. No. 564 of 1890, Madras (unreported), R.

- (11) "*Ubhayapattam*" mortgage, meaning of—Clog on redemption—Covenant to renew mortgage perpetually—Transfer of Property Act, S. 98, Application of, to anomalous mortgage made before the passing of the Act.

An "*Ubhayapattam*" is equivalent to a *Kanam* mortgage. A covenant to renew perpetually is a clog on the mortgagor's right to redeem and is inoperative, if it is entered into simultaneously with the mortgage. Where an anomalous mortgage was created prior to the Act, the question of its redemption has to be determined with reference to the law in force prior to that Act. It was observed that it was unnecessary to express any opinion as to the effect of S. 98, Transfer of property Act, on similar covenants in anomalous mortgages executed after the passing of the Act.

Mortgage.

—7.—(Redemption).—(Continued).

According to the rules of equity, which formed the basis of the course of decisions prior to the Act, but subsequent to 1856, any agreement entered into at the time of mortgage, having the effect of clogging the right of redemption was inoperative. **Neelakandan Nambudripad, alias Murthi Khandan v. Anantha Krishna Iyer**, 16 M.L.J. 462 = 1 M.L.T. 426 = 30 M. 61.

SUBRAHMANIA AIYAR and BENSON, JJ.

- (12) *Forgery of plaint bond*—Decree on the basis of earlier bond, validity of.

A redemption suit based on a forged mortgage bond should be dismissed, and redemption cannot be decreed on the footing of a prior mortgage bond. **Marangal Tarwattil Karanawan v. Moothedath Palasseril Kesavan Nambudri**, 2 M.L.T. 65 = 17 M.L.J. 122.

BENSON and WALLIS, JJ.

References:—13 M.L.J. 274, 18 M. 562, F.

- (13) *Interest—Charge—Redemption—Zar-i-raham*.

In interpreting usufructuary mortgages for purposes of redemption, the interest and redemption clauses have to be separately considered on their own merits as two distinct covenants.

Where a mortgage was redeemable according to its terms on payment of *Zar-i-raham* (mortgage-money)—

Held, that the mortgagor was entitled to recover possession on payment of principal only (a). **Bhag Mal v. Tale**, 6 P.L.R. 1907 = 44 P.W.R. 1907.

KENSINGTON, J.

References:—(a) 57 P.R. 1888, 8 P.R. 1890; 147 P.R. 1890 (F.B.); 78 P.R. 1892; 77 P.R. 1899; 114 P.R. 1901 = 175 P.L.R. 1901; 92 P.R. 1905 = 50 P.L.R. 1906, R.

- (14) *Mortgagor's right to discharge mortgage debt at any time*.

The general rule is that the debtor is at liberty to discharge the mortgage debt at any time, unless the terms of the document clearly prohibit and fix a time before which it is not to be paid (a).

The word "*saziki*" may be translated either as "*at the end of*" or "*within*," **Radha Krishna Panda v. Madhava Naik**, 17 M.L.J. 88.

BENSON and WALLIS, JJ.

Mortgage.—(Continued).**—7.—(Redemption).—(Continued).**

References :—(a) 2 M. 314, 10 A. 602, R.

(15) *Construction of document—Duty of the Court where a document has been wrongly construed so as to affect the interest of the party so construing—mortgage by conditional sale—Redemption—Limitation Act (XV of 1877), Sec. II, Arts. 134 and 148—Time from which limitation is to be reckoned—Sale of part of mortgaged property—bona fide purchaser—Redemption of part of mortgaged property on payment of proportionate amount when claim as to part barred by time etc.—Court Fees Act (VII of 1870), S. 7, sub-section IX—Suit for redemption with a prayer for recovery of surplus profits—Code of Civil Procedure, S. 373—improper valuation of Court fees.*

A Court is bound to consider the terms of a deed in accordance with the view as to its true meaning which the Court may entertain. Any improper construction put upon it by a party cannot be allowed to prejudice his rights, whatever they are upon its true construction.

Where a certain property was mortgaged by way of conditional sale for a period of nine years, and it was agreed that the sale would be cancelled on payment of the amount of the consideration money in nine years.

Held, that the agreement of the parties was that the loan was to be left outstanding for a period of nine years, and that, within that period, the mortgagee could not foreclose the mortgage, nor could the mortgagors redeem it.

Held, further, that for a suit for redemption, the time began to run, under Art. 148 of the second schedule to the Limitation Act, 1877, from the expiration of the term of nine years, and the mere fact that the plaintiffs alleged that the mortgage debt had been satisfied within that period did not affect the question of limitation.

It is well-settled law that a mortgage, as well as an out-and-out sale, by a trustee or a mortgagee, is a 'purchase' within the meaning of Art. 134 of the second schedule to the Limitation Act, 1877. The said article is applicable only to cases in which a purchaser, whether his purchase be absolute or *sub modo*, must obtain and hold possession for 12 years or upwards, in order that he may have that benefit of the article.

Held, therefore, that a person, who *bona fide* purchases from a mortgagee in possession what is represented to him and what he believes to be

Mortgage.—(Continued).**—7.—(Redemption).—(Continued).**

the absolute interest, is entitled to the protection of Art. 134 of the second schedule to the Limitation Act, 1877 (a).

When 12 villages were mortgaged to a mortgagee, 5 out of which passed to other persons from whom they could not be redeemed, on account of the claim being barred against them, *held*, that the mortgagor was entitled to redeem the remaining 7 on payment of a proportionate amount of the mortgage money.

S. 7, sub-section IX of the Court Fees Act (VII of 1870), provides that, in a suit for redemption, the Court fee should be valued at the principal amount secured by the mortgage, and the mere fact that the plaintiffs claimed, in the suit, payment of any sum, which might be found to be due to them on the taking of the accounts, did not alter the nature of the suit, so as to necessitate the payment of an additional fee on such sum.

S. 373 of the Code of the Civil Procedure empowers a Court to allow a plaintiff to abandon a part of his claim, with liberty to bring a fresh suit in respect of the part so abandoned, if the Court is satisfied that the suit must fail by reason of some formal defect or that there is sufficient ground for permitting him to abandon part of his claim. This section was intended to meet, amongst other cases, a case in which there has been an improper valuation of the Court-fee stamp. **Husani Begam v. Collector of Cawnpore**, 4 A.L.J. 375 = A.W.N. (1907), 133 = 29 A. 471.

STANLEY, C. J., and BURKITT, J.

References :—(a) 25 M. 99, 23 B. 614, D; 9 A. 97, 14 M.I.A. 1, 15 B. 583, 20 A. 482, 22 B. 225, 24 M. 471, 27 B. 373, R. and F.

(16) *Transfer of Property Act, S. 91—Mortgage—Redemption—Who may redeem—Perpetual lessee.*

In a suit for redemption of a mortgage, the plaintiff was a perpetual lessee of the mortgaged premises from the mortgagor, holding under a lease granted upon payment of a premium of Rs. 300, with a yearly rental of Rs. 40 odd. By the terms of the lease, the lessee was not liable to be ejected, even for non-payment of rent, while, if the title of the lessors proved defective, the lessee was entitled to a refund of the premium.

Held that the lessee was, under the above circumstances, entitled to redeem. **Raghunan-**

Mortgage.—(Continued).

-7.—(Redemption).—(Continued).

dan Prasad v. Ambika Singh, A.W.N. (1907), 227=4 A.L.J. 703=29 A. 679.

GRIFFIN, J.

References:—19 M. 151, 6 C. 317, 21 C. 116, 8 C. 79, 27 A. 472, R.

(17) *Redemption suit*—*Suit for redemption upon one mortgage*—*Failure to prove the mortgage*—*Defendant alleging possession under different mortgage*—*Decree for redemption*—*Malabar Law*—*Othidar's right of pre-emption*.

The plaintiff, as the purchaser at a Court-auction of the rights of an *illam*, sued to redeem a *kanom* alleged to have been granted by the *illam* to the first defendant, and impleaded the second defendant as being in possession, though without any valid title. The first defendant did not appear and the second defendant set up another mortgage from the same *illam*.

Held that the Court, on finding that the first mortgage had not been proved, could grant a decree for the redemption of the mortgage, under which the second defendant was in possession.

The othi-holder's right of pre-emption under the Malabar Law cannot be pleaded as a bar to the right of the purchaser at Court-auction of the *illam* to redeem without an offer to purchase that right. The othi-holder's right of pre-emption cannot be allowed in a suit brought to redeem him (*a*). **Sankara Moosad v. Ussain Haji**, 17 M.L.J. 329=2 M.L.T. 354=30 M. 388.

WHITE, C.J., and MILLER, J.

References:—(*a*) 24 M. 449 and 29 M. 339, F. Sudder Divisions (1857), 121; 5 M. 198; 9 M. 371, 7 M. 309, 13 M. 490; 15 M. 401 and 20 M. 305, R.

(18) *Purchaser, mortgagee, remedy of, in suit against person excluded in the mortgage suit*—*Mortgage sum, mode of adjustment of*—*Proportionate amount payable, ascertainment of*—*Amendment*—*Converting suit of one nature to another*.

When the mortgagee, in execution of a decree obtained against the owners of the equity of redemption except one, has brought the mortgaged property to sale and purchased it, he may bring an action for declaration of his title as purchaser at the mortgage sale and for recovery of possession, subject to the exercise of the right of redemption of the person excluded.

Mortgage.—(Continued).

-7.—(Redemption).—(Continued).

Quære.—Whether it is open to a mortgagee, who has omitted to implead a necessary party, to maintain another suit to enforce his security against the party excluded.

If the mortgagee has purchased some of the mortgaged properties, the defendant is entitled to redeem his own share in the disputed property, upon payment of a proportionate part of the amount due on the mortgage (*a*).

To find out the proportionate amount payable by the defendant, the value of all the properties comprised in the mortgage security at the date of the execution thereof should be first determined, as also the value of the disputed property. The principal amount of mortgage must then be distributed over all the properties comprised in the mortgage and the amount fairly chargeable to the share of the disputed property, proportionate to its value, will have to be calculated. The amount so fixed is the principal, which the defendant may be called upon to pay. Interest on this amount will run at the rate specified in the mortgage contract, from the date of the mortgage to the date fixed for re-payment, in the decree made in the mortgage-suit, and further interest at the Court rate, between the date fixed for re-payment and the date of actual realization. The principle is equally applicable whether the decree in the mortgage suit was upon contest or by consent. Against the sum so found due to the plaintiff should be set off the profits, if any, which may have been realised by the plaintiff by his possession of the disputed share (*b*).

When the mortgagee, who, in execution of his decree, purchased the mortgaged property, was subsequently deprived of it, then instituted a suit for recovery of the purchase-money against the person who was not made a party in the mortgage suit, on the ground that the effect of the previous litigation between the parties had been to deprive him of the disputed property, as also on the ground that the institution was due to the *dictum* in the judgment of the High Court, leave was granted to the plaintiff to amend his plaint and convert the suit into one for recovery of possession of the disputed share, subject to the exercise of the right of redemption of the defendant (*c*). **Jugdeo Singh v. Habibullah Khan**, 6 C.L.J. 612=12 C.W.N. 107.

BRETT and MOOKERJEE, JJ.

Mortgage.—(Continued).

—7.—(Redemption).—(Continued).

References:—(a) 5 C.L.J. 815 (326)=11 C. W.N. 403, R. (b) 31 I.A. 57=31 C. 332= 8 C.W.N. 609; 3 C.L.J. 611 (637), R. (c) 1 C.L.J. 337 (354), D.

(19) *Hindu Law—Mitakshara—Joint family—Mortgage by manager—Sale by mortgagee of mortgaged property in execution of money-decree prohibited—Transfer of Property Act (IV of 1882), S. 99—Mortgagee's possession not adverse—minor not bound by such sale—Modes of extinguishing right of redemption—effect of mortgagors' acquiescence or silence.*

S. 99 of the Transfer of Property Act prohibits a sale of mortgaged property held in contravention of the provisions of that section (a).

In a joint Hindu family governed by the Mitakshara, a son is not deprived of his equity of redemption by virtue of a sale prohibited by law (b).

A suit for redemption is not barred merely by reason of silence or acquiescence on the part of mortgagor unless there is a release of the equity of redemption (c). The only mode in which a mortgagee can extinguish the right of redemption are either by getting the mortgagor to execute a release of the equity of redemption in his favour, or by a proper suit under the Transfer of Property Act. A mortgagee by erroneously representing himself as owner of the mortgaged premises cannot make his possession adverse to the true owners. **Jhabba Lal v. Chhajju Mal**, 4 A.L.J. 787.

DILLON, J.

References:—(a) 21 C. 37, 30 C. 463, 17 A. 522, F; (b) 22 M. 372, F; 22 B. 624, Appl; (c) 32 C. 296, F. •

(20) *Suit for redemption—Pratice—Plaintiff suing as also heir—Death of plaintiff—abatement of suit.*

One P, sister of the respondent D, sued the appellant for redemption of mortgage, executed by P's father in favour of the appellant, on the ground that she, as an unmarried daughter, had obtained the sole right to the property of her father to the exclusion of her married sister, to whom along with herself, when a minor, the mortgaged property had, in a previous litigation between the parties interested in the mortgage, been surrendered by the order of the Court, which had held the

Mortgage.—(Continued).

—7.—(Redemption).—(Continued).

mortgage debt to have been satisfied. In the present suit D was made a *pro forma* defendant.

P having died during the pendency of the suit, D applied to have her name removed from the array of defendants and substituted as plaintiff.

Held, that the right claimed by P being a personal right and adverse to that of her sister D, the suit abated after P's death, and D could not get her name substituted as plaintiff and continue the suit. **Balak Puri v. Musammat Durga**, 4 A.L.J. 783.

STANLEY, C.J., and BURKITT, J.

(21) *Suit for redemption—Mortgage with possession—Duties of mortgagee in the choice of lessees.*

In a suit for redemption, where the mortgagor seeks to charge the mortgagee with possession, with moneys that he *might* have realized by way of rent, on the ground that he (the mortgagee) had been grossly negligent in leasing out the estate, and that he had let the mortgaged property at a lower rate than could be obtained, and where it was further found that the mortgagor, with knowledge of their low rates, did not inform the mortgagee of whom and where to obtain the higher rates, held that the mortgagor could not be given credit for sums that the mortgagee *might* have realised. **Rampartap Raghunath Das v. Sher Ali**, 3 N.L.R. 106.

BATTEN, A.J.C.

(22) *Right of a prior mortgagee to compel puisne mortgagee to redeem the whole—Redemption of a portion of the mortgaged property where the mortgagee refuses to allow redemption of the whole—Estoppel by defence raised in the previous case.*

Under a mortgage of September 1879 and a subsequent agreement, S became the mortgagee in possession, for a term of 12 years, of a 4 annas share of K and an 8 annas share of B, in two villages. In December, 1888, A mortgaged his 4 annas share for 30 years to the plaintiff, who redeemed the mortgage of 1879 and took possession of both shares. In 1897, B mortgaged his 8 annas share to the defendant, who then sued the plaintiff for redemption of that share on the payment of the amount due on it under the mortgage of 1879. The plaintiff insisted on the defendant redeeming the whole share of 12 annas, and the defendant's suit

Mortgage.—(Continued).**—7.—(Redemption).—(Continued).**

was dismissed. In 1899, the defendant brought another suit for redemption of both shares, obtained a decree and took possession. In 1901, plaintiff sued for redemption of the 4 annas share of *K* only, on payment of the amount due on it under the mortgage of 1879, but offered to redeem the share of *B* also. The defendant did not accept the offer.

Held, that the plaintiff was entitled to redeem *K*'s 4 annas share. **Jawahir Singh v. Baldeo Bakhsh Singh**, 10 O.C. 198 (P.C.) = 6 C.L.J. 672.

LORD ASHBORNE, LORD MACNAGHTEN,
LORD ATKINSON and SIR ARTHUR WILSON.

(23) Decree for redemption—Application for possession by mortgagor, whether one in execution of the decree—Form of application—C.P.C., S. 235—Limitation Act, Art. 179.

There is no section in the C.P. Code, under which an application for possession under a decree for redemption could be made.

Such an application by the mortgagor, on payment of the amount due, is not one in execution of a decree, to which the period of limitation prescribed by Art. 179 of the Limitation Act is applicable.

Such applications should not be in the form prescribed in S. 235, C.P.C. And they should be filed on the record of the suit, not in execution proceedings. **Maung Pe v. Ma Baw**, 4 L.B.R. 83.

IRWIN, J.

References:—17 A. 106, 10 M. 22, 16 B. 294, 21 M. 261, 19 C. 132, *R*; 22 C. 924, 29 C. 651, 8 C.W.N. 102, *F*.

(23-a) Right of one of several mortgagors to redeem the whole—contribution—S. 60, Transfer of Property Act.

Every one of several mortgagors has a right to sue for redemption of the whole mortgage on payment of the whole debt, himself suing the other sharers for contribution (*a*). Where, however, one of the mortgagees succeeds to the rights of one of two joint mortgagors, the other mortgagor can sue for redemption of his share alone on payment of his portion of the mortgage-debt, under the last proviso to S. 60 of the Transfer of Property Act (*b*). **Kathiru Haji Thampai Koya v. Pakiru Nakooru**, 22 T.L.R. 91.

GOVINDA PILLAI and EAPEN, JJ.

Mortgage.—(Continued).**—7.—(Redemption).—(Continued).**

References:—(*a*) 5 I.A. 18 (27) (P.C.), *Cited*; (*b*) 11 M. 804. *R*.

(23-b) Suit for redemption decreed—Subsequent suit for recovery of amount not taken into account—See RES JUDICATA, No. 4, 4 A.L.J. 768.

(24) Mortgage by conditional sale prior to 1882—Right of redemption, when lost—See REGULATION XVII OF 1806 (BENGAL), No. 4, 4 A.L.J. 717.

(25) Prior and puisne mortgage—Sale of mortgaged property—Redemption by vendee of prior mortgage—Suit for sale by puisne mortgagee—Dismissal of suit on the ground that previous mortgage not offered to redeem—Second suit for redemption of prior mortgage and sale—Res judicata—See CIV. PRO. CODR, No. 27, 10 O.C. 145.

(26) Sale independently of S. 99, Transfer of Property Act—Effect—Right to redeem—See TRANSFER OF PROPERTY ACT, No. 71, 17 M.L.J. 325.

(27) "Adimayavanna," meaning of—See RES JUDICATA, No. 7, 30 M. 203.

(28) Failure to redeem—Co-mortgagees acquiring occupancy rights—Tenancy in common—See OCCUPANCY RIGHTS, No. 3, 46 P.W.R. 1907.

(29) necessity for obtaining possession by person redeeming—See TRANSFER OF PROPERTY ACT, No. 66, 3 N.L.R. 92.

(30) Mortgagee paying a simple money-decree to save mortgaged property from sale—Charge—Mortgagee may recover amount paid in a suit for redemption—See TRANSFER OF PROPERTY ACT, No. 43, 4 A.L.J. 176.

(31) Mortgage of ancestral property by father or grandfather prior to son's birth—Son's right to redemption—See HINDU LAW (ALIENATION), No. 3, 11 C.W.N. 462.

(32) Suit by one member of a joint Hindu family—second suit by other members—See RES JUDICATA, No. 14, 3 A.L.J. 644 = A.W.N. (1906), 242 = 29 A.1.

(33) Mortgagor granting second mortgage pending suit to enforce first mortgage—Suit on second mortgage and sale of property in execution of second mortgage's decree—Purchaser's right to redeem first mortgage—See TRANSFER OF PROPERTY ACT, No. 16, 11 C.W.N. 561. (P.C.)

Mortgage.—(Continued),

——7.—(Redemption).—(Concluded).

(34) Form of decree in suit for redemption of usufructuary mortgage—Effect of non-compliance with decree—See TRANSFER OF PROPERTY ACT, No. 64, A.W.N. (1907), 137.

(35) Time for redemption—See TRANSFER OF PROPERTY ACT, No. 36, A.W.N. (1907), 133.

(36) Conversion of suit for possession on ejection into one for redemption, validity of—See SHEBATT, No. 1, 5 C.L.J. 527.

(37) Sub-mortgagee's right on redemption by original mortgagor—See SUB-MORTGAGE, No. 2, U.B.R. (1906), Sub-mortgage, 1.

(38) Mortgage with possession—Redemption by trespasser—Mortgagor's right—See LIMITATION ACT, No. 113, U.B.R. (1906), Limitation, 9.

(39) Suit for redemption dismissed for default—Fresh suit for the same barred—See CIV. PRO. CODE, No. 62, 43 P.R. 1907.

(40) Decree giving benamidar an opportunity to redeem—Benamidar failed to redeem—Beneficial owner could not maintain a separate suit to redeem—See BENAMEE TRANSACTION NO. 3, 4 A.L.J. 689.

(41) Suit for redemption—Second suit to recover mesne profits from the date of tender of mortgage amount to the date of delivery of possession—See CIV. PRO. CODE, No. 26, 9 Bom. L.R. 958.

(42) Right of mortgagor to redeem after due date fixed in decree for foreclosure or redemption—See TRANSFER OF PROPERTY ACT, No. 53, 3 N.L.R. 146.

——8.—(Simple Mortgage).

(1) Suit on, where no period for payment is fixed.

Where a document sued on is a simple mortgage and implies a covenant to re-pay, it cannot be contended that the mortgagor has not the right to redeem at any time after the execution of the deed. The mortgagee's right to foreclose is co-extensive with this right (a). So, a mortgagee can sue at any time after the execution of the bond, without a demand or a notice given before the institution of the suit. **Chengiah v. Pichayya**, 17 M.L.J. 177.

WHITE, C.J. and MILLER, J.

Reference :—(a) 23 M. 33, R.

Mortgage.—(Continued);

-9.—(Usufructuary).

(1) *Usufructuary mortgage bond—Covenant to pay—Suit to recover money—Possession, delivery of—Subsequent dispossession—Transfer of Property Act (IV of 1882), S. 68, cl. (c)—Cause of action.*

In a usufructuary mortgage bond, there was a hypothecation of the land, a covenant to repay the sum advanced as also an agreement, under which the mortgagees were entitled to take possession of the land and to enjoy the profits of the land in lieu of interest :

Held, it was not a pure usufructuary mortgage and the mortgagees were entitled to sue for their money.

Cl. (c) of S. 68 of the 'Transfer of Property Act is wide enough to include every instance of failure by a mortgagor to secure the mortgagee in undisturbed possession, at any time during the period for which the mortgagee is entitled to remain in possession. The subsequent dispossession of the mortgagee, after possession has been once delivered to him, is a failure on the part of the mortgagor to secure him in undisturbed possession (a).

Where possession was delivered to the mortgagee, but, on his calling on the mortgagor to give additional or substituted security, the latter entered into occupation and thus deprived the former of his possession :

Held, the mortgagee had a cause of action under cl. (c) of S. 68 of the Transfer of Property Act (b). **Pargan Pandey v. Mahatom Mahto**, 6 C.L.J. 143.

MOOKENJEE and HOLMWOOD, JJ.

References :—(a) 16 A. 318 (323), *Appr.* (b) 2 C.L.J. 493 ; 25 C. 450 ; 21 M. 242, R. 24 C. 677, D.

(2) Personal covenant to pay—Right of mortgagee to sue for sale—See TRANSFER OF PROPERTY ACT, No. 41, 10 O.C. 14.

(3) Mortgagee accepting profits in lieu of interest, clause as to, modified by a later clause providing for compound interest—See MORTGAGE (REDEMPTION), No. 7, 10 O.C. 92. (P.C.)

(4) Form of decree in suit for redemption of—Effect of not complying with decree—See TRANSFER OF PROPERTY ACT, No. 64, A.W.N. (1907), 137.

(5) Gift of mortgaged property by widow of usufructuary mortgagee—Mortgage by donee purporting to mortgage full proprietary interest

Mortgage.—(Concluded).

——7.—(Redemption).—(Concluded).

in the property—Foreclosure—Limitation—
See TRANSFER OF PROPERTY ACT, No. 36, A.W.
N. (1907), 133.

(6) Pre-emption suit—Usufructuary mortgagee cannot plead his mortgage as a shield when he himself is purchaser—Keeping alive of charge—See PRE-EMPTION, No. 3, 10 O. C. 49.

Mortgagee.

(1) from judgment-debtor after attachment—Representative—See CIV. PRO. CODE, No. 139, 17 M.L.J. 321.

(2) of holding—Right to surplus sale proceeds—See ACT VIII OF 1885 (BENGAL TENANCY), No. 35, 6 C.L.J. 26.

(3) Issue to mortgagor of notice of foreclosure by, within the period of redemption, whether valid and effective—See MORTGAGE (FORECLOSURE), No. 4, 119 P.R. 1906=81 P.L.R. 1907.

Mortgagor.

(1) Issue of notice of foreclosure to, before expiry of period of redemption, whether valid and effective—See MORTGAGE (FORECLOSURE), No. 4, 119 P.R. 1906=81 P.L.R. 1907.

Moveable property.

(1) *Suit for recovery of specific moveables—Refusal of defendant to produce—Valuation put by plaintiff accepted.*

The plaintiff sued for the recovery of certain specific moveable property, which he valued at Rs. 1,360, and produced evidence to show that this was the value. The defendant refused to accept the plaintiff's valuation, but would not produce the articles, which, he did not deny, were in his possession. *Held* that, under such circumstances, the valuation made by the plaintiff ought to be accepted by the Court. **Anand Chandra v. Dhanrup Mal**, A.W.N. (1907), 227.

KNOX, C.J. and DILLON, J.

Reference :—1 Smith L.C., 1903, p. 356, F.

(2) Conditional sale of—Bond—Effect of non-payment of debt within time limited—See CONDITIONAL SALE, No. 1, A.W.N. (1907), 93.

(3) Fraudulent transfer of, validity of,—See TRANSFER OF PROPERTY ACT, No 21, 16 M.L.J. 427=1 M.L.T. 351=30 M. 6.

(4)—if includes money—Limitation Act, Art. 145—See DEPOSIT, No. 1, 6 C.L.J. 535.

Municipality Act (Bombay City).

See ACT III OF 1888 (Bombay)

Municipality Act (Calcutta).

See ACT III OF 1899 (BENGAL).

Municipalities Act.

(1) See ACT III OF 1884 (BENGAL).

(2) See ACT IV OF 1884 (MADRAS).

(3) See ACT I OF 1900 (AGRA AND OUDH).

(4) See ACT XX OF 1891 (PUNJAB).

Municipal orders.

(1) Civil Court's power to interfere with—See JURISDICTION (OF CIV. COURTS), No 2, 58 P.R. 1907.

Municipal tax.

(1) Apportionment of—See ACT IV OF 1884 (DISTRICT MUNICIPALITIES), No. 3, 17 M.L.J. 306.

Mushaa.

(1) Applicability of doctrine of—See MUHAMMADAN LAW (GIFTS), No. 2, 4 A.L.J. 572.

Mutation proceedings.

(1) Construction of—whether they embody a recognition of an existing right or creation of new one, must be deduced from circumstances—See CUSTOMS (PUNJAB), No. 63, 65 P.W.R. 1907.

Nazul.

—or Government land held revenue free, whether constitutes a mahal with rest of the village—See PRE-EMPTION, No. 20, 10 O.C. 257.

Necessaries.

—Goods supplied on order of person entitled to portion of estate—Estate whether bound—See CONTRACT, No. 4, 17 M.L.J. 484.

Negotiable Instruments Act.

See ACT XXVI OF 1881.

Newspaper.

Proprietor of, selling his rights in it—Soliciting old customers—See GOOD-WILL, No. 1, 3 Bom. L.R. 312.

Noabad Mehal.

(1)—in Chittagong District—Incidents—Taraf and noabad property distinguished—“Noabad taraf,” what is—Settlement whether permanent or temporary.

Where the question was whether a certain mehal, known as mehal *Noabad taraf* Joy Narain Ghosal, in the District of Chittagong

Noabad Mehal.—(Concluded).

was a part of the permanently settled "taraf" of the proprietor or consisted merely of ordinary "noabad" lands temporarily settled and liable to periodical resettlement and annexed to the proprietor's "taraf" for convenience only.

held—that the special history of the tenure from 1763, when it was created, showed that the mehal was neither the one nor the other.

The mere fact that a mehal is a "noabad" mehal does not necessarily attach to it the incidents of ordinary noabad properties of later creation.

All "noabad" mehals of Chittagong have this in common, that the proprietors have to pay rent or revenue to Government. But the incidents of different noabad mehals may vary very greatly.

The incidents of the present mehal determined, and, *held*, mainly upon the basis of a *kabuliat* executed by the proprietors in favour of the Government in 1852, that the revenue was fixed in perpetuity on the *hasila* area only. **Ram Sundar Saha v. The Secretary of State for India in Council**, 11 C.W.N. 928.

MITRA and CASPERSZ, JJ.

Northern India Canal and Drainage Act.

See ACT VIII OF 1873.

North-West Frontier Province.

Jurisdiction of Chief Court, Punjab, to hear appeal from—See JURISDICTION (OF HIGH COURT), No. 1, 50 P.R. 1907, (F.B.).

Notice.*

(1) to quit—Tenant from year to year—Tenant-at-will—Demand of possession from tenant-at-will necessary—See LANDLORD and TENANT, No. 5, 11 C.W.N. 225.

(2) Whether necessary before suit to eject an under-riyat—See ACT VIII of 1885 (BENGAL TENANCY), No. 20, 11 C.W.N. 190.

(3)—to quit, necessity for, in the case of a purchaser of the tenancy from the legatee of a deceased tenant—See TRANSFER OF PROPERTY ACT, No. 78, 5 C.L.J. 205.

(4) Necessity of—to under-tenants, prior to suing them in ejectment—See SERVICE TENURE, No. 1, 11 C.W.N. 46=5 C.L.J. 53.

(5) Necessity of—on abandonment of an *Utbandi* tenure—See UTHANDI TENURE, No. 1, 5 C.L.J. 398.

Notice.—(Concluded).

(6)—to agent before agency does not bind principal—See TRANSFER OF PROPERTY ACT, No. 2, 11 C.W.N. 1109.

Oath.

(1) *Evidence balanced on both sides—Refusal to take oath proposed by other party—its effect.*

Where there is evidence on both sides, and a doubt arises as to which is the true case, a refusal to take oath may well be taken into consideration to decide the point (a).

But where the Court found that the evidence for the defendant standing alone was not such that it could be safely acted on, the Court could not decide in the defendant's favour, merely because the plaintiff refused to take the oath proposed to him. **Kojakuli Ranga Naik v. Guruviya Bhatta**, 2 M.L.T. 327.

BENSON and WALLIS, JJ.

Reference :—(a) 22 B. 683, F.

(2) *Agreement to be bound by defendant's oath—Power of withdrawing after acceptance by defendant.*

A complete proposal by the plaintiff to be bound by the defendant's oath before a certain temple, is binding upon the plaintiff, if the defendant accepts such proposal. It will not be open to the plaintiff to withdraw after the acceptance, except for some good reason. **Yelayuda Gounden v. Narayanaswami Gounden**, 17 M.L.J. 536.

BENSON and SANKARAN NAIR, JJ.

References :—22 M. 234, 17 M.L.J. 100, F.

Oaths Act.

See ACT X OF 1873.

Occupancy rights.

(1) *Acquisition of—Landlord and tenant—Procedure Act (VIII of 1869 B.C.), S. 6—Act X of 1859—Occupancy holding, submergence—Rent, non-payment of—Extinguishment—Bengal Tenancy Act (VIII of 1885).*

To enable a riyat to acquire a right of occupancy under S. 6 of Act VIII of 1869 (B.C.) or under Act X of 1859, his possession must ordinarily be continuous for twelve years, over the whole of the land, in respect of which a right of occupancy is claimed (a).

The fact that the plaintiff was in occupation of different areas of lands in different years, would not entitle him to a right of occupancy in the whole, unless it was proved that he had a right

Occupancy rights.—(Continued).

of occupancy in a portion, and the parties intended that the additional lands also should be impressed with the existing rights in respect of the original lands of the holding.

Under S. 6 of Act VIII of 1869, a raiyat retains his right of occupancy only so long as he pays rent. But, although mere non-payment of rent might not be conclusive evidence of abandonment, non-payment of rent taken with submergence of land is sufficient to indicate an extinguishment of right of occupancy (b).

An occupancy holding was deluviated at a time when Act VIII of 1869 was in force, and the lands had continued under water for thirteen years before the present Bengal Tenancy Act was passed in 1885:

Held, whatever right was acquired by the raiyat, was extinguished by non-payment of rent during the period of submergence before the Act of 1885 came into force; as he had no subsisting rights in 1885, the provisions of Act VIII of 1885 could create no new rights in his favour, nor revive those which had already been extinguished. **Saligram Singh v. Puluk Pandey**, 6 C.L.J. 149.

MOOKERJEE and HOLMWOOD, JJ.

References:—(a) 22 W.R. 228, R. (b) 4 C. 894, F. 13 M.I.A. 407, R. 18 A. 290, D.

(2) *Sale of occupancy in tenure in favour of landlord—Validity of such transfer.*

Held that the sale of an occupancy tenure by a tenant to his landlord is valid. **Binda Prasad and others v. Rajendra Prasad**, 10 O.C. 235.

CHAMIER, J. C.

Reference:—13 A. 396, R.

(3) *Succession to—Co-mortgagees with distinct specified shares under one deed acquiring occupancy rights on mortgagor's failing to redeem within a certain time—Difference between a joint tenant and tenant in common—Right of survivorship—Jus-accrescendi.*

By a deed dated 12th March, 1862, land was mortgaged to K. N. and K.S. in specified shares, each mortgagee exercising a third share in the entire property. It provided that, failing redemption within two years, mortgagees will acquire occupancy rights in the land.

K. died in 1867 and his interest passed to his three sons S, S and H.

In the redemption suit of 1878, it was decided that the mortgagees had acquired occupancy

Occupancy rights.—(Continued).

rights, and that the mortgagors were entitled to merely redeem the mortgage *qua* their proprietary rights in the land.

N. also died about this time, and his sons succeeded to his share.

In 1885, the holding was entered in the Revenue papers as joint between the mortgagees.

On the death of K. S. in 1905, his brother H. and the descendants of S. and S. sued to succeed to the holding of K. S.

Held, that the suit fails, as, under the above circumstances, the tenancy was not joint, but held in common, and though, in the case of a joint tenancy, on the death of one of the joint tenants, his interest does not pass to the landlord, this principle is not applicable in the case of the death of one of the several tenants in common; so as to entitle the other tenants to succeed to his interest by right of survivorship as by *jus accrescendi*.

Difference between a tenant in common and joint tenant explained.

Obiter. The word "occupied" in S. 59 of the Punjab Tenancy Act (XVI of 1887), means "actually occupied" and does not include an occupation, which is merely such by implication of law. **Khan Singh v. Hardit Singh**, 46 P.W.R. 1907.

RATTIGAN and LAL CHAND, JJ.

References:—209 P.R. 1894, F. 2 P.R. 1867, 57 P.R. 1868, 36 P.R. 1870; 159 P.R. 1879; 4 P.R. 1880; 180 P.R. 1882; 9 P.R. 1891 (Rev) and 6 P.R. 1892, R and D.

(4) *Law governing succession to occupancy holding—See ACT XI of 1898 (TENANCY), No. 6, 3 N.L.R. 112.*

(5) *Succession to—Punjab Tenancy Act, Ss. 111 and 112—Right of person to settle, by written agreement, a course of succession different from that prescribed in the Act—See ACT XVI of 1887 (PUNJAB TENANCY), No. 14, 130 P.R. 1907.*

(6) *Transfer of occupancy holding—Consent of landlord subsequent to sale—Recognition—See LANDLORD and TENANT, No. 15, 5 C.L.J. 294.*

(7) *Suit by a reversioner to restrain alienation of occupancy rights by occupancy tenant—Custom—See BURDEN OF PROOF, No. 2, 98 P.R. 1907.*

(8) *Whether—can be acquired by under-tenants in the case of a service tenure—See SERVICE TENURE, No. 1, 11 C.W.N. 46= 5 C.L.J. 58.*

Occupancy rights.—(Concluded).

(9) Acquisition of, by representatives of one founder against another—See ACT XVI OF 1887 (PUNJAB TENANCY), No. 1, 1 P.R. 1907 (Rev).

Office brokerage.

(1) Validity of—See CONTRACT ACT, No. 15, 17 M.L.J. 252.

Order.

(1) Erroneous order carried out—Subsequent proceedings whether void—Waiver—See APPEAL (GENERAL), No. 5, 6 C.L.J. 547.

Oudh Laws.

See ACT XVIII OF 1876 (OUDH).

Owner.

(1) Claim in the capacity of—inconsistent claim as under easement—See ALTERNATIVE CLAIMS, No. 1, 4 C.L.J. 437-34 C. 51-11 C. W.N. 20-1 M.L.T. 364 (F.B.).

Pakky Adat agency.

Nature of—See CONTRACT ACT, No. 21, 9 Bom. L.R. 903.

Paper Currency Act.

See ACT XX OF 1832.

Pardanishin.

Deeds executed by—Burden of proof—See MAHOMEDAN LAW (SUCCESSION), No. 2, 8 Bom. L.R. 781-31 B. 165.

Parties.

(1) Addition of, after remand—Landlord and Tenant—Ejectment suit—Parties—Suit by some of the landlords not maintainable.

After a case is remanded under S. 566 of the Civ. Pro. Code, the Court, to which the case is remanded, is not competent to add parties to the suit.

A suit for ejectment against the tenants, filed by some of the landlords only, is not competent. **Hargulal v. Khusal**, 20 P.L.R. 1907.

ROBERTSON, J.

(2) Assignment *pendente lite*—Addition of assignee as co-defendant after the period of Limitation—See LIMITATION ACT, No. 38, 3 P.R. 1907.

(3) Suit to recover a debt due to a firm—Family business—Necessity to join all members as parties—See HINDU LAW (JOINT FAMILY), No. 8, A.W.N. (1907), 58.

(4) Addition of—Appellants—Tests—See CIV. PRO. CODE, No. 111, 5 C.L.J. 434.

Parties.—(Concluded).

(5) Recognised agent of party not himself a party—Names of parties to be correctly entered in proceedings—See PARTNERSHIP, No. 2, 4 L.B.R. 23.

Partition.

(1) Plaintiff's suit for—dismissed—One of the defendants in the suit applying to have his share partitioned off—Contention disallowed—*Privilege*.

Where a plaintiff, who brings a suit for partition, fails to establish his right to partition, it is not open to any of the defendants to claim, in the suit, partition, upon the ground that such defendant has a share in the property.

When a suit for partition is brought by a person alleging that it is undivided property and that he has a certain share in it, the law requires that, in order to enable the Court to ascertain such person's share, it must have before it, as parties to the suit, all the persons admittedly having, or claiming to have, shares in the property. The *quantum* of the share of the plaintiff must be determined with reference to the number of sharers and their respective sharers. That is the reason of the rule. But where the case of the plaintiff fails on the preliminary ground that he has no right to a share at all, and that a suit for partition, is not maintainable at his instance, the person of the rule fails to apply. If the plaintiff is found to have no share at all, there is no suit for partition and consequently no necessity for determining the defendant's share. **Ashidbai v. Abdulla Haji Mahomed**, 8 Bom. L.R. 758-31 B. 271.

CHANDAVARKAR J.

References:—3 C. 551, 24 B. 128 and 23 B. 188, *Distd.*

(2) Partition decree—Declaration of shares to which plaintiff entitled—Details to be worked subsequently—A step in the action and not a step in aid of execution—Limitation.

Where a decree merely states the shares in the immoveable property to which plaintiffs are entitled, and leaves these as well as all other necessary figures to be worked out and settled at some subsequent period, the decree is not a final or executable decree.

Before there can be any final or executable decree, all these matters must be worked out and determined in the suit, and, therefore, an application for the partition of the immoveable property in the above case is merely a further step in the action to which no limitation

Partition.—(Continued).

applies (a). **Ramaswamy Naicker v. Ramaswamy Kamaya Nalckar**, 2 M.L.T. 265.

BODDAM and MOORE, JJ.

References :—(a) 22 C. 425, 24 C. 575, 32 C. 483 and 28 M. 127, *It*.

(3) *Partition between co-sharer and ijaradar of other co-sharers—Similarity of possession—Temporary lease—Occupancy raiyat—Relinquishment of holding in favour of ijaradar—Expiry of ijarah—Right of landlord to recover khas possession—Costs.*

Where a lessee of lands in the occupation of raiyats, who had *jote* rights, obtained *khas* possession of the lands, with the consent of the raiyats, for the purpose of indigo cultivation :

Held—that the lessee, being merely a landlord in occupation, did not acquire occupancy-right in the lands, and the lessor became entitled to *khas* possession on the expiry of the lease.

A lessee held certain lands in a village under three separate temporary leases from three undivided co-sharers of the village. On the expiry of one of the leases, the lessor in question sued for *khas* possession, on partition of his separated share. His other co-sharers, who, with the lessee, had been made parties to the suit, raised no objection.

Held—that there was no bar to a decree for partition being made in the case (a).

But the plaintiff ought to pay the entire costs of the partition, as a fresh partition of the entire *mouzah* may be necessary on the expiry of the other leases. **Ram Lochi Koeri v. Herbert Collingridge**, 11 C.W.N. 397 = 5 C.L.J. 307.

MITRA and HOLMWOOD, JJ.

References :—24 C. 143, *It*. (a) 24 C. 575, 1 C.L.J. 40, *Appr*.

(4)—*of joint property, suit for—Costs, appeal for—Appeal, if and when maintainable—Principle, matter of—Proprietors and lessees, interest as—Allotment of shares in proprietary and leasehold interests—Costs up to the preliminary decree by whom payable—Rateable distribution—Costs, subsequent to preliminary decree, by whom to be borne—Lessor and lessee, liabilities of, to pay costs—Apportionment.*

An appeal will lie upon a question of costs, when a matter of principle is involved (a).

Partition.—(Continued).

As the plaintiff in a partition suit commences it for his own advantage, convenience and security, and as the defendant, as joint owner, holds his undivided share always subject to the right of the plaintiff to demand partition, the parties must each bear their own costs of the suit, up to the stage of the preliminary decree, and the costs of the partition should be divided between the parties in proportion to their respective shares in the estate (b).

If, however, there has been a frivolous contest, the party, by reason of whose opposition unnecessary costs are incurred, may be made liable (c).

A lessee, who accepts a lease of a share in joint property, does so with full knowledge that the subject matter is liable to partition, and if he finds himself a defendant in a partition suit, it is by reason of his own voluntary act, and, in such a suit, each party must bear his own costs up to the first hearing or preliminary decree, and the costs of the partition should be borne by the parties in the proportion of their interests. If the lessee took no part in the partition proceedings, and neither claimed nor obtained the benefit of a separate allotment, he could not be called upon to contribute to the costs of the partition. But if he did, the costs must be borne by him rateably with the other parties, according to his interest in the premises.

A permanent lessee may be regarded as a purchaser and will be entitled to similar privileges and subject to similar liabilities.

The costs of the partition should, as between the lessor and the lessee, be borne by them in proportion to their respective interests in the share covered by the *mokurari* (lease) (d). **Nawab Dildar Ali Khan v. Bhowani Sahai Singh**, 5 C.L.J. 642 = 34 C. 878.

MOOKERJEE and HOLMWOOD, JJ.

References :—(a) 12 C. 179, 12 C. 271, *Defd*. &c. (b) 12 W.R. 160, *It*, 17 Ves. 533; 1 White and Tudor 181, 216; 27 Beav. 632; 2 Drury and Walsh 700; 2 Ir. Ch. Rep. 324; 12 Ir. Ch. Rep. 205, *cited*. 21 C. 904, *Distd*. (c) 7 Ch. Div. 367, *It*. (d) 2 Tones (Ir.) 803; 10 Ir. Eq. Rep. 479, *It*. 2 Cox. 27, *explained and Distd*.

(4-a) Award directing—Stamp—See STAMP ACT, No. 2, 8 Bom. L. R. 869 = 31 B. 68.

(5) *Putni estate—Holder of fractional share in a mouza of the estate—Right to partition that mouza without partitioning other mcuzas.*

Partition.—(Continued).

A putnidar of a fractional share of a mouza can partition his share in it, held jointly by himself and some of the defendants, although the defendants may be jointly interested with or without other persons in the remaining mouzas of the Zemindari, provided that such partition does not place the defendants in a position of inconvenience. * **Uma Sundari Debi v. Benode Lal Pakrashi**, 34 C. 1026.

* STEPHEN & HOLMWOOD, JJ.

References :—1 C.L.J. 40, 20 C. 682, R.

(6)—*of joint property*—Portion omitted by mistake—Fresh suit for partition or joint possession, if maintainable—Co-owner, adverse possession by.

Where, in a suit for the partition of joint property, by reason of a mistake of the parties which was shared by the Commissioner who was appointed to make the partition, a certain portion of the property was omitted from the report and the final decree did not deal with the lands comprised in that portion.

Held—That the effect of the decree was to leave unaffected the joint title and possession of the parties in the lands omitted in the decree.

That such lands may be partitioned in a subsequent suit at the instance of one of the parties.

A mere determination of the shares by the preliminary decree is not tantamount to partition.

The entry into and possession of land under the common title by one co-owner will not be presumed to be adverse to the others, but will ordinarily be held to be for the benefit of all.

A co-tenant will not be permitted to claim the protection of the statute of limitation, unless it clearly appears that he has repudiated the title of his co-tenant and is holding adversely to him. It must further be established that the fact of the adverse holding was brought home to the co-owner.

The possession of a wrong doer cannot be constructively extended over lands not actually in his possession. **Jogendra Nath Roy v. Baladeb Das Marwari**, 12 C.W.N. 127 = 6 C.L.J. 735.

MOOKERJEE and CASPERSZ, JJ.

(7) Test of—can take place only upon the assumption that both parties are interested in the subject matter of litigation—See **ESTOPPEL**, No. 2, 6 C.L.J. 621.

Partition.—(Concluded).

(8) Suit for partition—Denial by defendant of plaintiff's title—Effect—Fixed fee or *advalorem* fee—See **COURT FEES ACT** (VII of 1870), No. 18, 12 C. W. N. 37.

(9) Suit for—See **ACT III OF 1901** (U. P. **LAND REVENUE**), No. 5, A.W.N. (1907), 175.

(10)—of joint family property—Suit for—Parties—See **MISJOINDER**, No. 1, 10 O.C. 32.

(11) Conversion of suit for possession into suit for—See **POSSESSION**, No. 2, 22 T.L.R. 107.

Partition Act.

See **ACT IV OF 1893**.

Partners.

(1) Liability of surviving partner—Purchase by, of deceased partner's property—See **TRUSTS ACT**, No. 3, 9 Bom. L.R. 606.

(2) *Settled accounts*—Error—Re-opening—Surcharge and falsification—General words of release—What passes.

B and S, partners, had the partnership accounts strictly adjusted, and Rs. 39,465-7-0 was found due to B. By a deed of assignment, B, in consideration of Rs. 34,000, assigned and released his share in the firm to S. By common mistake, Government promissory notes for Rs. 7,000 were omitted from the accounts. On discovery of the mistake, B sued for a share of the notes.

Held, either the whole account may be re-opened, or leave may be given to B to surcharge and falsify. The latter is the more proper course on the facts of this case (a).

General words of release in a deed can only operate to pass what the parties had in contemplation, and not something with which they had no intention of dealing (b). **Baney Madhub Mullick v. Subal Chunder Law**, 11 C.W.N. 776.

CHITTY J.

References :—(a) 5 M.I.A. 372, 9 Beav. 503, 9 Ch.D. 547, R; (b) 4 H.L. 610, 14 Ch. D 829, R.

Partnership.

(1) *Suit for money by one partner against another.*

Where a partner sued a customer, for recovery of price of jewellery sold and, also, made his co-partner a defendant praying that, if the latter had received the money, the decree might be passed against him :

Held, that one partner cannot sue another in this wise ;

Partnership.—(Continued).

that, if one partner thinks that his co-partner has not been treating him properly, his proper remedy is to apply for the dissolution of the partnership and to have its accounts taken. **Bhut Nath Das Malakar v. Girish Chandra Banerjee**, 11 C.W.N. 311.

MACLEAN, C.J., and CASPERSZ, J.

- (2) *Suit by or against firm, maintainability of—Partners—Recognised agent of party not a party to suit—Court's error in entering names of parties to proceedings.*

A firm cannot sue or be sued: only the partners can sue or be sued. The recognised agent of a party is not, as such, a party himself. In proceedings, generally, and in judgments and decrees especially, Courts must take care to enter the names of parties correctly, as any error or neglect of such points may lead to needless confusion and expense and delay to suitors. **Mutu Raman Chetti v. Myat Nyein**, 4 L.B.R. 23.

IRWIN, J.

- (3) *Debt due from the firm—Liability of assignee of a partner on admission—Contract Act, Ss. 140, 251.*

Where the plaintiff paid sums on a security bond, executed by him on behalf of a partnership firm, the assignees of a partner admitted into the partnership by the other partners would also be liable to re-imburse the plaintiff, although the creditor had not absolved the assignor or accepted the assignment (a).

It is not open to a partner in a firm, who is himself alone under a certain liability to an outsider, to engage on behalf of the whole firm that all its members shall be subject to that liability, unless he obtains authority from his partners so to engage. (a) **Niharku v. Madho**, 107 P.R. 1907.

JOHNSTONE, J.

Reference:—4 A. 437, R.

- (4) *Suit by surviving partners—Debt due to partnership—Whether representatives of deceased partner necessary parties.*

The representatives of a deceased partner are not necessary parties to a suit for recovery of a debt which accrues due to the partnership in the lifetime of the deceased. **K.Y.P.L. Perianen Chetty v. Armuga Pather**, 4 L.B.R. 99.

FOX, C.J.

References:—18 C. 86, Diss. 17 M. 108; 20 M. 232; 19 B. 338, R. and F.

Partnership.—(Concluded).

- (4-a) *Suit to recover debt due to a—under a contract with one partner only—Right of such partner to sue by himself—See CONTRACT ACT, No. 20, 127 P.R. 1906=10 P.W.R. 1907.*

- (5) *Attachment of joint property of partnership—Procedure—See CIV. PRO. CODE, No. 235, 9 Bom. L.R. 540.*

Patni.

Suit by patnidar for possession of Chakram lands—Resumption of the lands by Government and subsequent restoration to landlord—See LIMITATION ACT, No. 87, 34 C. 564.

Pattah.

Tender of, to manager of joint Hindu family—See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), No. 4, 17 M.L.J. 251.

- (2) *Tender of, and execution of muchilika, effect of—Second tender of, invalid—See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), No. 6, 30 M. 253.*

Patwari.

- (1) *Patwari's rates and cesses—Plaintiffs suing as assignees of Government revenue—whether they can recover.*

In a suit to recover the patwari's rates and cesses paid by the plaintiffs on behalf of the defendant, a zemindar, it was held, that they could recover the said rates and cesses in the same manner as in a suit for arrears of revenue, and a suit for their recovery lies as a suit to recover arrears of revenue. As for these rates the persons with whom the mahal was settled incurred a joint liability, and so, the plaintiffs must be deemed to have paid them as co-sharers. **Narain Singh v. Kesho Das**, 4 A.L.J. 816.

GRIFFIN, J.

Pauper.

—plaintiff, if can be required to furnish security for defendants' costs.—See CIV. PRO. CODE, No. 219-a, 12 C.W.N. 163.

Peishcush.

Private agreement apportioning, not binding on Government—See ACT I OF 1876 (MADRAS), No. 1, 16 M.L.J. 468=1 M.L.T. 421=30 M. 106.

Penalty.

Stipulation by mortgagor to pay on redemption the principal sum and half as much again—*Deorha*—Whether amounts to penalty—See CIV. PRO. CODE, No. 275, 10 O.C. 214.

Pensions Act.

See ACT XXIII OF 1871.

Perishable property.

Attachment and sale of—Disposal of sale proceeds—See CIV. PRO. CODE, No. 159, 4 L.B.R. 16.

Permanently settled estate.

Separate registration of alienated portion of,—Jurisdiction of Collector—Private agreement apportioning *peishcush* not binding on Government—See ACT I OF 1876 (MADRAS), No. 1, 16 M.L.J. 468=1 M.L.T. 421=30 M. 106.

Permanent tenure.

- (1) *Proof of—Origin of grant not known—Grant for residential purposes—Substantial structures.*

Where the original nature of the grant was unknown and it was found that the predecessor in interest of the defendants, who were purchasers in execution of a decree, were tenants on the land and were in occupation for nearly sixty years, and that they raised substantial structures on the land, and the grant was for the purpose of residence,

Held, that the lower Courts were justified in drawing the inference that the holding was permanent. **William M. Grant v. Mrs. Robinson**, 11 C. W. N. 242=5 C.L.J. 178.

MACLEAN, C.J., and HOLMWOOD, J.

- (2) What amounts to—See LANDLORD and TENANT, No. 23, 6 C.L.J. 122 (P.C.).

Pin-money.

- (1) Agreement to pay, to daughter-in-law—Unchastity and refusal to reside with husband—Whether daughter-in-law entitled to enforce it—See MARRIAGE, No. 2, 4 A.L.J. 13.

Plaint.

- (1) Rejection of—in part not allowable—See CIV. PRO. CODE, No. 57, A.W.N. (1907), 68.

- (2) Return of, to be presented to proper Court—Appeal from order of return—See CIV. PRO. CODE, No. 31, 5 G.L.J. 580.

- (3) General prayer in—for getting such relief as the Court may think fit to grant—Suit for possession and declaration—Suit for declaration of half only of a property—Relief granting declaration for whole—See CUSTOM (PUNJAB), No. 57, 26 P.W.R. 1907.

- (4)—ordered to be returned to the plaintiff for presenting to a Court of competent jurisdiction on discovery of the incompetency of the

Plaint.—(Concluded).

Court to hear the suit—See JURISDICTION (of CIV. COURTS), No. 3, 16 P.W.R. 1907.

- (5) Admission of, through mistake or inadvertence—Court fee—See COURT FEES ACT (VII OF 1870), No. 7, A.W.N. (1907), 110.

- (6) Rejection of, after admission and registration, legality of—See CIV. PRO. CODE, No. 58, 4 C.L.J. 421=34 C. 20=11 C.W.N. 38=1 M.L.T. 355.

- (7) Presentation of—in insufficiently stamped—Making up of the stamp duty subsequent to the period of Limitation for the suit—Validity—See LIMITATION ACT, No. 2, 123 P.R. 1907.

- (8) Presentation of, on opening day after vacation—See LIMITATION ACT, No. 15, 9 Bom. L. R. 1329.

- (9) Omission to seek further relief when such relief is possible—Duty of Court—Amendment of—See SPECIFIC RELIEF ACT, No. 9, 128 P.R. 1907.

- (10) Appeal against order rejecting or admitting—See CIV. PRO. CODE, No. 283, 6 C.L.J. 214.

- (11) Death of defendant before presentation of plaint—Jurisdiction of Courts to substitute his legal representatives—See CIV. PRO. CODE, No. 206 a, 17 M.L.J. 551.

Pleader.

- (1) See ADVOCATE.

See COUNSEL.

& See SOLICITOR.

- (2) *Charges of professional misconduct—Inquiry into those charges—Opportunity to cross-examine—Witnesses—Evidence—Legal evidence—Hearing of arguments by Advocate—Practice—High Court—Disciplinary jurisdiction.*

In an enquiry into the alleged professional misconduct of a pleader, the Court examined two witnesses, and also the pleader, on the understanding that the pleader was not then a person on his defence. The pleader was given no opportunity of cross-examining the witnesses, and was not allowed to address the Court upon the evidence. The Judge then expressed an opinion, adverse to the pleader, that he had deliberately made a false statement in Court:

Held, by Jenkins, C.J., that, having regard to the nature of evidence and the defects in procedure, it would not be safe to accept the opinion of the Court.

Pleader.—(Concluded).

Held, by Beaman, J., that there was no good evidence upon which the charge could be sustained, since it was doubtful whether reading and criticising depositions or other matter, which, if objected to, could not be received in evidence, makes those depositions or that matter evidence, unless the objection or objections are expressly waived.

Per Jenkins, C. J.—It is clear that a Judge, in the great majority of cases, cannot do full justice to a case, without hearing the arguments, which the advocates desire to address. **The Government Pleader v. Maganlal N. Choksi**, 9 Bom. L. R. 866 = 6 Cr. L. J. 216.

JENKINS, C.J., and BEAMAN, J.

Pleader and client.

(1) *Agency—Relation between co-mortgagors one of whom a pleader, if fiduciary—Accountability—Settled accounts—Suit to falsify—Specific averment of errors necessary—Changing suit for accounts into suit to falsify settled accounts—Procedure in account suits.*

A person does not become the agent of another, merely because he gives him advice in matters of business. The essence of the matter is, that the principal authorises the agent to represent, or act for the principal, in bringing, or aid in bringing, him in contractual relation with a third person, that is to say, there must be a recognition of the derivative authority of the agent.

A solicitor who has been employed as such in a transaction for investment of money may be liable for negligence in lending money on insufficient security. But the liability varies with the extent of the part he is employed to take in the transaction (a).

Plaintiff jointly with one R, a pleader, advanced money on what turned out to be insufficient security. It was, however, found that the plaintiff knew and approved of the security at the date of the investment.

Held, that the plaintiff could not call upon R to recoup him any loss he sustained by reason of the insufficiency of the security, even though he might have obtained the advice of R as pleader on entering into the transaction.

The requisites for making an account a settled account depend on the circumstances of each case and the mode of dealing between the parties (b).

Pleader and client.—(Continued).

If a settled account is impeached for errors, particular errors must be stated and proved, and the same rule holds even when the account has been settled errors excepted.

Where the plaintiff made no averment in his plaint that accounts had been settled, but commenced action on the footing that no accounts had been rendered.

Held, that the plaintiff could not, after the suit had been tried out on that footing, be allowed to convert the case into one for re-opening the accounts on the ground of errors contained therein.

Procedure in account suits indicated, and that adopted in the present case condemned.

In a suit for account, if liability to account is denied by the defendant, the question of accountability is to be tried first. It is only after an adverse decision against the defendant upon this question that he may be called upon to render an account (c). **Moresh Chandra Basu v. Radha Kishore Bhattacharjee**, 12 C.W.N. 28 = 6 C.L.J. 580.

MOOKERJEE and HOLMOOD, JJ.

References:—(a) 39 Ch. D. 179 (185), *R.* (b) 1 Ball & Beatty 420 (428); L.R. 2 H.L. 1; 5 M.I.A. 372 and 8 Moor. P.C. 378, *R.* (c) 14 C. 147, *R.*

(2) Suggestion as to a matter of fact by a pleader—decision in appeal based on, impropriety of—See EVIDENCE, No. 2, 11 C.W.N. 130 = 1 M.L.T. 429 = 5 C.L.J. 4 = 9 Bom. L.R. 80 (P.C.) = 17 M.L.J. 32.

(3) Reference by pleader to arbitration, not being expressly authorised—See CIV. PRO. CODE, No. 243, 4 A.L.J. 342.

(4) Delay in filing appeal due to appellant *bona fide* accepting erroneous legal advice—See LIMITATION ACT, No. 14, A.W.N. (1907), 219.

Pleader's fees.

Costs on account of, allowed according to the valuation of the estate or according to importance of the subject of dispute—Discretion—See PROBATE, No. 1, 6 C.L.J. 458.

Pleadings.

(1) *Counsel—Omission to argue question of law or abandoning a point—Power of Court to go into question.*

Omission of a counsel either to argue a question of law, or his abandoning a question of law is not sufficient to disentitle Court to go into

Pleadings.—(Continued).

the question. (a). **Ramsaran Sing v. Khakhan Singh**, 11 C.W.N. 340.

MITRA and HOLMWOOD, JJ.

Reference:—(a) 27 C. 156, followed.

- (2) *Suit to redeem converted into a suit to recover possession on payment of a charge—Compromise in settlement Court not equivalent to a mortgage—Limitation Act (1877), Sch. II, Art. 144—Adverse possession—Charge—Transfer of Property Act, S. 100—Recovery of the whole share.*

On the basis of a compromise, a decree was passed, in favour of the ancestors of the plaintiff and his co-sharers, by the Settlement Courts, to the effect that they would be entitled to the possession of their share in the property, if they paid their share of the family debts, and if they failed to do so, the defendants would be entitled to take possession of the whole of their shares. It was also added in the compromise, that, if afterwards the plaintiff and his co-sharers paid the whole of the debt due from them, they would be entitled to recover possession of their shares. The defendants paid the entire amount and took possession of the whole share of the plaintiff and his co-sharers. The plaintiff now sought to redeem his own share, as well as that of his co-sharers, on the payment of the amount due from him and his co-sharers on account of their share. The defendants pleaded that the suit to redeem was not maintainable and was also barred by limitation, as they had been in possession for more than 12 years. They also pleaded that the plaintiff could not recover more than his own share.

Held, that the above compromise did not create the relationship of mortgagor and mortgagee between the parties to it, and no suit for redemption could lie, but the suit of the plaintiffs should not be dismissed, merely because the plaintiff had stated in his plaint that the above compromise had created such a relationship. The suit was actually for recovery of the property on payment of a certain charge and should have been decreed as such. The actual facts were clear from the pleadings, and the defendants were not in any way prejudiced by such a view of the case.

Held, further, that the suit being really one for possession of the property on payment of a charge, it was governed by Art. 144 of the second schedule of the Limitation Act, and as the defendants had not succeeded in showing

Pleadings.—(Concluded).

that they had been in adverse possession for more than 12 years before the date, on which the present suit was instituted, it was not barred by limitation.

Held, also, that the plaintiff could recover not only his own share, but also those of his other co-sharers, on payment of the amount due from him, as well as from those other co-sharers. **Karim Bakhsh Khan v. Mehdi Hasan Khan**, 10 O.C. 17.

SCOTT, J.C.

- (3) The strict rule that averments not traversed must be taken to be admitted, is not applicable to—in Indian Courts. **Deo Nundan Pershad v. Meghu Mahton**, 11 C.W.N. 225 = 5 C.L.J. 181 = 34 C. 57.

RAMPINI and MOOKERJEE, JJ.

Reference:—9 M.I.A. 287, F.

- (4) Paper-book—Inclusion of irrelevant papers not objected to by respondents—Successful appellant not deprived of any part of his costs—See LIMITATION ACT, No. 77, 11 C.W.N. 424.

- (5) Fact alleged in plaint and not expressly denied by defendant is to be taken to have been admitted by the latter. See MORTGAGE (EQUITABLE), No. 1, 53 P.W.R. 1907.

Pledge.

- (1)—of bills of lading without notice of seller's claim for price of goods—See CONTRACT ACT, No. 40, 34 C. 173.

Possession.

- (1) *Suit for possession based on possessory title of plaintiffs' predecessor—plaintiffs never themselves in possession—Cause of action—Specific Relief Act, S. 9.*

Plaintiffs sued, as heirs, to recover certain property, which had been in the possession of their deceased father, without any legal title, and was appropriated by their brother, to the exclusion of the plaintiffs, and purchased by the defendants in execution of a decree against him and was in the peaceable possession of the defendants for a little less than 12 years.

Per KNOX, J.:—*Held*, that, inasmuch as the plaintiffs had never, at any time, been in possession of the property claimed by them, their suit would not lie (a).

Per AIKMAN, J. (Contra).—The plaintiffs' father having held a possessory title—hereditary and transferable—good as against all except the

Possession.—(Concluded).

true owner, there was nothing to prevent his heirs bringing the present suit (*b*). **Shri Gopal v. Ayesha Begam**, A.W.N. (1906), 264=3 A.L.J. 775=29 A. 52.

KNOX and AIKMAN, JJ.

References:—(*a*) 24 A. 157, 26 M. 514, 27 A. 169, 12 A. 51, 20 C. 884, *Distd.* (*b*) 13 A. 537, 24 A. 157, 27 A. 169, A.W.N. (1906), 184, 26 M. 514, 12 A. 51, *R.*

(2) *Suit for, conversion of, into one for partition.*

Where a person brings a suit for possession of the whole of certain properties, but is found to be entitled only to a share therein, he need not be referred to a separate suit for partition, but the suit may be treated as praying also for a partition and possession of the plaintiff's share in the plaint properties. **Yava Kunjul Abdul Kunju v. Atchuthan Aiyappan**, 22 T.L.R. 107 (F.B.).

SADASIWA AIYAR, C.J., PADMANABHA AIYAR AND RAMACHANDRA ROW, JJ.

(3) *Suit for, conversion of, into one for redemption*—See MORTGAGE (GENERAL), No. 19, 5 C.L.J. 653.

(3-*a*) *Suit on title—Dispossession within six months before suit*—See SPECIFIC RELIEF ACT, No. 11, 4 A.L.J. 601.

(4) *Meaning of, in S. 55, Land Registration Act*—See ACT VII of 1876 (LAND REGISTRATION, BENGAL), No. 1, 12 C.W.N. 16.

(5) *Registration of names, if constitutes—Possession follows title, rule of, when applicable—Possession, delivery of, effect of*—See ACT XI of 1859 (REVENUE SALE LAW, BENGAL), No. 6, 6 C.L.J. 472.

Posthumous chela.

(1) *Inheritance—appointment by widow of Goshain*—See HINDU LAW (INHERITANCE), No. 1, 3 A.L.J. 717.

Posthumous son.

(1) *Revocation of Hindu Will by birth of,*—See HINDU LAW (WILLS), No. 5, 17 M.L.J. 269.

Power of appointment.

(1) *Exercise of—Power created after will*—See ACT X of 1865 (SUCCESSION), No. 6, 9 Bom. L.R. 488.

Power of attorney.

(1) *Construction of*—See CONSTRUCTION (OF DEEDS), No. 2, 6 C.L.J. 490.

Power of attorney.—(Concluded).

(2) *Construction of—Act done under it challenged as in excess of authority conferred by power*—Proof—See AGENT, No. 1, 6 C.L.J. 699.

Practice.

(1) *Civil Court—Reversing decree as to part of disputed property and remanding the suit as to remainder—Piecemeal decision.*

A Court of appeal dismissed a suit as against two of the defendants, and so far as concerned part of the plaint property; but remanded it for decision on other points, as regards the remaining property and defendants:—

Held that the High Court cannot countenance this piecemeal decision of the suit. Findings on the issues may of course be recorded from time to time as the hearing proceeds, but in the nature of things, the pronouncement of the decree must be reserved until the materials laid before the Court have all been fully assimilated. **Ganu Anantshet v. Ganu Mahadev**, 9 Bom. L.R. 966.

RUSSELL, A.C.J. and KNIGHT, J.

(2)—*Motion for contempt—Execution of a decree—Civ. Pro. Code (Act XIV of 1882), S. 244.*

Where there is a genuine dispute between the parties about the right way of executing a decree, it should be formally dealt with under S. 244 of the Civ. Pro. Code, and not brought indirectly and incidentally before a Judge on a motion for contempt. **Jamsetji Nusserwanji Mehta v. Scrabjee Rustomjee Zubedar**, 9 Bom. L.R. 1361.

BEAMAN, J.

(3) *Death of defendant before institution of the plaint—Procedure—Suit for purchase-money—Alienation deed signed by vendor only—Limitation Regulation, Art. 96.*

As soon as it is proved that a man impleaded as defendant, was dead at the time the plaint was filed, the Court should refuse to proceed further in that suit, and leave the plaintiff to begin *de novo* against the person against whom alone he could move (*a*).

The sections of the Civil Procedure Code relating to the bringing in of legal representatives of deceased parties are applicable only where the death takes place *pending the suit*, and not where, even before the suit, the party supposed to be impleaded had died.

A contract which has in fact been registered is no less a contract in writing registered,

* Practice—(Concluded).

because it bears the signature of only one of the parties, in the absence of a statutory provision requiring the signatures of both parties (b).

In a suit for the recovery of unpaid purchase money, the fact that the alienation deed was signed by the vendor only, the vendee not having himself signed it, is not material. It is, all the same, a contract in writing registered, and is governed by Art. 96 of the Limitation Regulation. **Umman Mathal v. Eapen Kochukunju**, 22 T.L.R. 200.

SADARIVA IYER, C.J., and HUNT, J.

References :—(a) 25 W. R. 17 and 2 Ex. 54, *R* and *F*. (b) 19 M. 52, *F*. 2 M.L.J. 69, *R*.

(3-a) Accounts—No specific direction as to accounts—Decree contemplating accounts—Direction can be given at a subsequent stage—See ACCOUNTS, No. 2, 9 Bom. L.R. 1880.

(4)—of Bombay High Court—Taxation of costs—See HIGH COURT RULES (BOMBAY), No. 5, 9 Bom. L.R. 1014.

(5) Practice as to allowing costs of counsel—See COSTS, No. 2, 9 Bom. L.R. 983.

(6) Party being misled by a uniform practice of the Court—whether “sufficient cause” for not presenting appeal within proper time—See LIMITATION ACT, No. 10, 10 O.C. 201.

(7) suit by some members of family in respect of family property—All co-parceners must join—See HINDU LAW (JOINT FAMILY), No. 4, 9 Bom. L.R. 1126.

(8) Laches or delay, how far a bar to legal remedy—Presumptions from delay in case of infant or female—See LACHES, No. 1, 9 Bom. L.R. 1117.

(9) Document not mentioned in the plaint—Inspection by defendant before filing written statement—See CIV. PROC. CODE, No. 60, 9 Bom. L.R. 1084.

(10) Counsel giving evidence on behalf of clients of matters with which he became acquainted before employment—See COUNSEL, No. 2, 9 Bom. L.R. 1044.

(11) Judge's notes of Counsel's address—Evidence of the address—See COUNSEL, No. 1, 9 Bom. L.R. 1042.

Pre-emption.

(1) *Partition of village, effect of—custom—not liable to modification.*

A custom must not be merely ancient, but it must be continued, uninterrupted, uniform,

Pre-emption.—(Continued).

certain and definite. A custom is not capable of an abrupt, automatic change and is not liable to modification by the fact of the partition of the village.

A village, the *wajib-ul-arz* of which gave a right of pre-emption to the co-sharers of the village over strangers, was divided into three mahals and no new *wajib-ul-arz* was prepared for any mahal. The co-sharer in one of the mahals, purchased a share in the other mahal, in which plaintiff was a co-sharer; held that the plaintiff had no right of pre-emption. By partition, the custom had either ceased to exist or still prevailed. In both cases, the plaintiff could not succeed. If it ceased, there was no right of pre-emption. If it still prevailed, the defendant was entitled to pre-empt under it (a). **Gobind Ram v. Masihulla Khan**, 4 A.L.J. 187 = A.W.N. (1907), 39 = 29 A. 295.

STANLEY, C.J., and BURKITT, J.

References :—(a) 22 A. 1, *R*. 1 A.L.J. 33, not followed.

(2)—*Wajib-ul-arz—Construction of document.*

In a village, which consisted of three *thoks*, the pre-emptive clause of the *wajib-ul-arz* gave a right of pre-emption, first, in favour of *haki ki bhai bhatijon sharik zamindari hon* and, in the second degree, to co-sharers in the second and third *thoks* of the village; held, on a construction of this document, that, as against a stranger, a co-sharer in the *thok*, in which the property sold was situate, had a right of pre-emption, although he might not fall under the head of *hakiki bhai bhatije*. **Ghunni Lal v. Madan Mohan Lal**, A.W.N. (1907), 55.

KNOX and RICHARDS, JJ.

(3)—*Civil Procedure Code, S. 424—Notice to public officer—Vendor not necessary party in pre-emption suit—Dismissal of pre-emption suit for non-joinder of vendor—Objection as to want of notice under S. 424, to be taken only by Secretary of State—Money supplied for litigation in a pre-emption suit by “third person”—Cost of improvement—Cost of stamp paper required for sale-deed—Usufructuary mortgagee cannot plead his mortgage as a shield when he himself is purchaser—Charge, keeping alive of.*

The Deputy Commissioner, as Manager, Court of Wards, sold to the defendant certain villages one of which was previously held by him under a usufructuary mortgage, the amount of which was deducted from the sale-price. The plaintiff

Pre-emption.—(Continued).

as under-proprietor claimed pre-emption. The defence was that the suit for pre-emption was not maintainable, because no notice under S. 424 had been given to the Deputy Commissioner, that the suit had been instituted with funds provided by a third man, the plaintiff being merely a nominal plaintiff acting on his behalf. The Deputy Commissioner raised no objection for want of notice under S. 424, Civil Procedure Code. The defendant also claimed, in case plaintiff was allowed to pre-empt, certain amounts which he had spent in raising an embankment and improving the property and in purchasing the stamp paper for the sale-deed. He also contended that the plaintiff should not be allowed to get possession of the village previously held by the defendant under the usufructuary mortgage.

Held, that the suit against the Deputy Commissioner was bad for want of notice under S. 424, Civil Procedure Code, and should have been consequently dismissed as against him. But the suit was not liable to be dismissed as against the vendee, inasmuch as, under the circumstances, the vendor was not a necessary party (a).

Held, also, that the objection as to the sufficiency of a notice under S. 424, Civil Procedure Code, could only be taken by the Secretary of State, for whose benefit the notice was intended (b).

Held, further, that the suit was not liable to dismissal, simply because it was carried on with money supplied by a third person.

Held, also, that the pre-emptor was not liable to pay the cost of improvements or of the stamp for the sale-deed. The only thing, which the pre-emptor could be ordered to pay, was the sale-price.

Held, lastly, that the defendant, as purchaser of the equity of redemption, could not, in the absence of a special contract to the contrary, set up his own previous mortgage as still subsisting (c). **Bindeshuri Singh v. Pandit Balraj Sahai**, 10 O.C. 49.

CHAMIER and EVANS, J.Cs.

References:—(a) 25 A. 137, 3 A. 20, 25 C. 239, 9 O.C. 275, 26 A. 549, 6 A. 57, A.W.N. (1903), 239, 80 P.R. 1888, 134 P.R. 1889, R (b) 1 C.L.J. 542, F. (c) L.R. 1 Ch. D. 1896, 726, R.

(4) *Wajib-ul-arz—Construction—Contract or custom.*

Pre-emption.—(Continued).

Where the recital in a *wajib-ul-arz* does not clearly show that it is the record of a contract it must be held to be record of custom. (a). Where a *wajib-ul-arz* provided that co-sharers wished to "record the matters entered below and that they will remain bound by it," and in matters of transfer it provided that, at the time of transfer, "it shall be necessary (*lazim hoga*)" for a co-sharer to transfer to his co-sharers, *held* that the recital was not a record of contract and that the words *lazim hoga* did not make it a record of contract.

It is always dangerous to construe one *wajib-ul-arz* by another. **Baldeo Sahai v. Nagai Ahir**, 3 A.L.J. 850 = A.W.N. (1907), 17.

AIKMAN, J.

Reference:—(a) A.W.N. (1897), 3, F.

(5) *Grove-holder—Owner of land on which a grove stands, a co-sharer—(Government revenue, non-payment of—Co-sharer, meaning of—Oudh Laws Act, S. 9.*

Held, that the owner of a plot of land in the village, on which there stands a grove, for which no Government revenue is paid, is a co-sharer, for the purposes of pre-emption, within the meaning of the Oudh Laws Act. **Ram Kishun v. Nadir Husala**, 10 O.C. 86.

SCOTT, J.C.

References:—7 O.C. 284, R; 28 A. 246, Diss.

(6) *Suit for—Market value, evidence of—Price actually paid, how far evidence of market value.*

Held, that, in a pre-emption suit, in the absence of any other evidence, the actual price paid is good evidence of the market value. **Abilakh v. Babban Singh**, 10 O.C. 88.

SCOTT, J.C.

(7) *Wajib-ul-arz—Record of contract—Termination of contract with settlement.*

The *Wajib-ul-arz* of a village of the year 1866, recited "so far there have been no sales or mortgages to strangers, but in future if any co-sharer wishes to transfer, he shall do so first to co-sharer, &c." *Held*, that this was a record of contract which came to an end with the settlement. After the settlement which terminated the contract, there was no right of pre-emption in the village. **Gopal Das v. Tej Singh**, 4 A.L.J. 191 = A.W.N. (1907), 87.

STANLEY, C.J., and BURKITT, J.

(8) *Sale to a stranger with the concurrence of a co-sharer—purchase by the co-sharer*

Pre-emption.—(Continued).

concurring—revesting—suit for pre-emption maintainability of.

The object of pre-emption is to keep strangers out of the co-parcenary body of a village, and to maintain the unity of the co-parcenary body. If, before pre-emption proceedings are instituted, the property has found its way into the hands of co-sharers, there is no reason for allowing pre-emption, which is, by the way, a very weak right.

Where certain property was sold to a stranger, with the concurrence of two of the co-sharers, but, before the suit for pre-emption was instituted, they again purchased it, *held* that the suit could not be maintained. The fact, that the co-sharer concurring could not maintain a suit for pre-emption, does not preclude him from purchasing and setting up a revesting of the property in himself. **Liakat Husain v. Rashid-ud-din**, 3 A.L.J. 794 = A.W.N. (1906), 313 = 29 A. 125.

STANLEY, C.J., and RUSTOMJEE, J.

Reference:—25 A. 421, R.

- (9) *Payment of purchase-money by pre-emptor into Court—Decree in favour of pre-emptor—Withdrawal of purchase-money by vendee, effect of—Vendee's right of appeal—Punjab Court Act, 1884, S. 70 (2) (b) IV.*

There is no provision in the Civ. Pro. Code, which would justify a dismissal of an appeal in a pre-emption suit, merely because the appellant has withdrawn the purchase-money paid into Court for his benefit. The appellant (judgment-debtor) having been compelled by process of Court to part with possession, if he received its equivalent as a part of the execution proceedings, it cannot even be inferred that, by withdrawing the purchase-money, he acquiesced in the decree passed by the lower Court and thereby accepted its validity. Nor can the judgment-debtor be thereby intended to abandon his appeal.

Where an appeal is admitted under S. 70 (b) (IV) of the Punjab Courts Act, 1884, the appellant is not entitled to question the validity or soundness of the findings of facts given by the lower appellate Court.

The question, whether a deed of transfer purporting to be a mortgage-deed is in reality such a deed or a sale, is a question of fact, and

Pre-emption.—(Continued).

not of law. **Sunder Das v. Dhanpat Rai**, 16 P. R. 1907.

ROBERTSON and LAL CHAND, JJ.

- (10) *Wajib-ul-arz—Construction of document.*

By the terms of a *wajib-ul-arz*, it was provided that "if any co-sharer for any reason wishes to part with his share, he can sell it first to a *bhai-ek-jaddi*, after him to co-sharers in the *patti* or *thok*, and after them to other co-sharers, for a reasonable price. The *bhai-ek-jaddi* will have to give the same price as offered by a stranger; but if the price appears to be fictitious, a decision can be made by mutual arrangement or by a Court or by panchayat." *Held* that the effect of this provision was to give a right of pre-emption to successive categories, one against the other in order. The right did not only arise when the sale was to a stranger. **Ram Lal v. Niadar**, A.W.N. (1907), 95 = 4 A.L.J. 352.

STANLEY, C.J., and BURKITT, J.

References:—27 A. 457, D.

- (11) *Successive purchases by same vendee—Second purchase made before institution of suit for pre-emption based on the first purchase.*

Held that it is not open to a defendant, in a suit for pre-emption, to set up, as a defence to the suit, a second purchase of a share in the same village, made subsequently to the purchase, upon which the suit is based, but prior to the institution of the suit. **Nabihan Bibi v. Kaleshar Rai**, A.W.N. (1907), 110 = 4 A.L.J. 351.

STANLEY, C.J. and BURKITT, J.

Reference:—25 A. 421, D.

- (12) *Zemindari and grove—grove not appurtenant—Separate Court-fee not paid—dismissal of suit in respect of grove only.*

Plaintiff brought a suit for pre-emption of a zemindari share and a grove, which was said to be appurtenant thereto, and paid Court-fee on five times the Government revenue on the zemindari share. The Courts below found that the grove was not appurtenant to the zemindari and dismissed the suit as insufficiently stamped, no Court-fee having been paid on the grove.

Held, that the suit should not have been dismissed *in toto*, but only in respect of the grove, if it was found that it did not appertain to

Pre-emption.—(Continued).

the zemindari. **Rohan Singh v. Bhau Lal**, 4 A.L.J. 403=A.W.N. (1907), 163.

STANLEY, C.J. and BURKITT, J.

- (13) *Suit for pre-emption in a bhaya chara village on ground of relationship—Proof of special custom—Value of chakwar wajib-ul-arz—Document containing custom of whole Tahsil tribe by tribe—Earlier and later wajib-ul-arz, conflict between—Ss. 31 (2) (b) and 44, Act XVII of 1887 (Punjab Land Revenue).*

In a suit for pre-emption of land in a *bhaya chara* village, the grounds being the agnatic relationship of the plaintiff to the vendor and his being a *jaaddi malik*, whereas vendee is a *malik* by purchase, plaintiff, in order to prove that relationship helps him, should prove a special custom to that effect.

The *chakwar wajib-ul-arz* is not, properly speaking, part of the settlement record, which is a village record, and, therefore, no presumption of correctness attaches to it under S. 44 of the Act (a).

Even if it be taken to form part of the settlement record, the circumstance that it states the custom of pre-emption as *tribal*, whereas pre-emption is peculiarly a *local* custom, deprives the entry of all its presumptive value (b).

Where a village *wajib-ul-arz* states no custom, but does not exclude it, the party alleging a special custom must prove it. A document, in which customs are stated for a whole Tahsil, tribe by tribe, inasmuch as it does not deal with rights and liabilities "in an estate," cannot be said to fall within S. 31 (2), cl. (b). Having, therefore, no presumptive value, it only helps to prove them, and serves as a guide to enquiry, but actual instances of enforcements of the customs stated are necessary.

The value of even a genuine *wajbi-ul-arz*, favoring relatives in the matter of pre-emption, and standing unsupported by actual proof of custom, followed by a later *wajab-ul-arz*, in which the "law" of Act IV of 1872 is stated to contain the rule of pre-emption, is so small as to be virtually *nil*. Technically, the value is not *nil* (c); but even negative indications, the other way, are sufficient to reduce its value to nothing (d). **Guldad Khan v. Gul Khan**, 44 P.R. 1907.

JOHNSTONE and SHAH DIN, JJ.

Pre-emption.—(Continued).

References:—(a) 87 P.R. 1905 and Civil Appeal 127 of 1899, *It.* (b) 26 C. 81 (P.C.), *R.* (c) 52 P. R. 1896 and 85 P.R. 1905, *R.* (d) 27 P.R. 1893, 98 P.R. 1894 (F.B.), 52 P.R. 1896, 78 P.R. 1904, 95 P.R. 1905 and 70 P.R. 1905, *R.*

- (14) *Purchaser having equal right to pre-empt with plaintiff joining in purchase with one having inferior right—Plaintiff's right of pre-emption.*

Where a purchaser of land and houses, who has equal right of pre-emption with that of the plaintiff, joins with himself in the purchase a person who has an inferior right, the plaintiff is entitled to take over the whole bargain, the sale being one and indivisible. **Achhru v. Labhu**, 48 P.R. 1907.

CHATTERJI and JOHNSTONE JJ.

*References:—*10 P.R. 1884, 94 P.R. 1895, 66 P.R. 1896, *F.*; 19 A. 148 (F.B.), *Diss.*

- (15) *Custom—Pre-emption—Presumption—Town and village—S. 10, Act IV of 1872 (Punjab Law)—Una, Hoshiarpur Dt.*

The distinction drawn in the Act is not between agricultural land and non-agricultural land, but between land in village and land in town. In a town, even as regards assessed and cultivated land, the custom of pre-emption is not to be presumed, but must be proved.

As the place Una in Hoshiarpur district was certainly a town, when it was an emporium for the trade of the hills years ago, it must be considered as a town and, therefore, a custom of pre-emption must be proved to exist there. **Harjallu Mal v. Nathu Ram**, 51 P.R. 1907 = 38 P.L.R. 1907.

JOHNSTONE and RATTIGAN, JJ.

*References:—*22 P.R. 1906 and 27 P.R. 1907, *R.*

- (16) *Price to be paid in pre-emption suits—Market value—Good faith.*

Before a Court proceeds to assess market value in pre-emption cases and to call upon a plaintiff to pay that, it must satisfy itself that the price stated in the deed was not fixed in good faith. But, where the debt is genuine, though most of it is made up of interest, and the land, which is the subject of the suit, is not the vendor's only asset, and he is not insolvent, and there has been a sort of adjustment of value, in a manner to suit vendor and vendee, and not a wholesale wiping out of, all

Pre-emption.—(Continued).

vendor's liability to vendee, there is no pre-emption as to the bad faith of the price fixed. **Ajuddhia Pershad v. Ahsanullah**, 56 P.R. 1907.

JOHNSTONE and RATTIGAN, JJ.

References:—75 P.R. 1901, 68 P.R. 1902, F; 77 P.R. 1901, D.

(17) *Simultaneous sale of two adjoining houses—Right of pre-emptor and vendee.*

A purchase by a person of one of two adjoining houses cannot give him a right of pre-emption as regards the simultaneously purchased other house. Nor can he defeat the right of pre-emption of the next door neighbour of the second house.

A person whose right of pre-emption extends over only a part of the property, which is a distinct part, could obtain a decree for that part. **Uttam Chand v. Lahori Mal**, 112 P. 1907.

JOHNSTONE and HURRY, JJ.

(18) *Vendee assigning the property before suit for pre-emption—Transferees not male parties—Fresh suit against transferees—Limitation Act, Art. 10—Applicability.*

A pre-emptor instituted a suit against the vendor and vendee for pre-emption and obtained a decree. Before the suit, the land had been assigned by the vendee to certain persons. Held, that the pre-emptor, in order to bind the transferees, should have impleaded them in the previous suit, or should institute a fresh suit. Such a suit against the transferees would be a pre-emption suit and should be brought within the period of limitation prescribed in Art. 10 of the Limitation Act. **Raushan v. Makhan**, 106 P.R. 1907.

JOHNSTONE, J.

References:—25 P.R. 1903, 98 P.R. 1902 and 46 P.R. 1902, R.

(19) *Suit for—Auction purchaser, right acquired by, before confirmation of sale—Sale of an equitable interest liable to pre-emption—Contract to sell property liable to pre-emption, if complete—Civil Procedure Code, Ss. 310 A and 311.*

Before the sale had been confirmed, the auction-purchasers transferred the property to the sons of the judgment-debtor who were not co-sharers in the village. In a suit for pre-emption, on the basis of the aforesaid sale, brought by the plaintiff-respondent who was a co-sharer in the village it was contended on be-

Pre-emption.—(Continued).

half of the appellants, the sons of the judgment-debtor, that at the date of the execution of the sale deed in their favour there was no interest acquired by the auction-purchasers in as much as the sale had not till then been confirmed, and therefore the transaction evidenced by the sale deed was not a sale which could form the basis of a suit for pre-emption, and that, if the auction-purchasers had any interest at all which they could sell, it was of such a shadowy and uncertain character that the sale of it could not be the subject of a suit for pre-emption.

Held, assuming that no title passed on the execution of the sale deed, there was at least a completed contract to transfer the property which could validly form a subject of a suit for pre-emption.

Held, further, that the interest acquired by the auction-purchasers prior to the confirmation of sale was not of an uncertain character. It was an equitable interest, enforceable against the judgment-debtor, of which they could not be deprived, either by the judgment-debtor, or any other person claiming under him, except by proper proceedings taken in accordance with Ss. 310A or 311, Code of Civil Procedure. **Zalim Singh v. Kalloo Singh**, 10 O.C. 273.

CHANIER, J.C.

References:—S.C. 300, 8 O.C. 202, 24 A. 475, 2 C.W.N. 589, 9 O.C. 86, 9 O.C. 331, 21 C. 496, 9 O.C. 163, R.

(20) *Suit for—Oudh Laws Act, 1876, S. 9, cls. (2) and (3)—Revenue free land, suit for pre-emption, with respect to—Nazul or Government land held revenue free, whether constitutes a mahal with the rest of the village—Co-sharer, test of being a—Village-community, member of, claim decreed as—Estoppel, elements necessary to be proved in order to constitute.*

The respondent brought a suit for pre-emption with respect to 25 and odd bighas of revenue free land situate in mauza C. The land formed part of an area of 126 and odd bighas recorded at the first settlement as Nazul or Government land, for which no revenue was payable, and which had been sold by the Government to a private individual. After various transfers the appellant Bank purchased the land at an auction sale held in execution of its own decree, and subsequently sold it to

Pre-emption.—(Continued).

the appellant S without giving the respondent, a sharer in the village, notice in the manner prescribed by S. 10 of the Oudh Laws Act. The respondent claimed to pre-empt both as a sharer in the village and as a member of the village-community under second and third clauses of S. 9 of the Oudh Laws Act. The defence was that the respondent was not entitled to pre-empt the property either under the second or under the third clause of S. 9, and that he was estopped from making the claim as he had refused to purchase the property when it was offered to him by the Bank.

Held, that, as the land in suit was not in any way responsible for the revenue assessed upon the village, the respondent and the Bank were not co-sharers of the same mahal, and, therefore, the respondent could not claim to pre-empt the property under the second clause of section 9 of the Oudh Laws Act, but that the respondent could pre-empt the property as a member of the village-community under the third clause of S. 9 and that it was not necessary that the vendor should be a member of the village-Community.

Held also, after reviewing the evidence, that no case for estoppel had been made out. **Bank of Upper India v. Munshi Alop Prasad**, 10 O. C. 257.

CHAMIER, J.C. and GREEVAN, A.C.J.

Reference:—5 O. C. 395, R.

(21) *Owner of plots of land in abadi, whether a co-sharer—Co-sharership, test of—Liability to be sold up for arrears of revenue—Right to pre-empt as a member of village community—Sale to a stranger without specification of shares.*

Held that, where a person is the owner of plots of land in the inhabited area of a village, he is to be deemed, for the purposes of pre-emption, a co-sharer in the village; as the test of co-sharership is whether the land held by him would be liable to be sold in case of a sale or arrears of Government revenue (a).

Held, further, that such a person could in any case be allowed to pre-empt as a member of the village-community (b).

Held, also, that, where in a purchase a co-sharer associates with himself a stranger and there is no specification of the shares acquired by each of them, the co-sharer loses his preferential right to purchase and the whole property sold is liable to pre-emption (c). **Aula**

Pre-emption.—(Continued).

Husain and another v. Musammat Zainab-un-nisa, 10 O.C. 225.

SANDERS and GREEVAN, A.J.C.

References:—(a) 10 O.C. 86, *Appr.* 26 A. 57. (P.C.), 16 A. 412, *R.* 28 A. 246, *not F.* (b) 7 O.C. 19, *R.* (c) 7 O.C. 22, *F.*

(22) *Wajib-ul-arz—Co-sharer—Owner of resumed muafi land.*

The pre-emptive clause of a *wajib-ul arz* contained the following provision:—“*Minjunla malikon ke agar koi hissadar apni haqqiat bai karne chzhe, to awwal dusre hissadar sharik haqqiat ki hath bai karega.*” This clause occurred in a chapter headed “conditions which apply to zamindars only.” *Held* that the ownership of resumed *muafi* land did not confer upon the owner a right of pre-emption as a *hissadar*. **Munna Lal v. Narain Prasad**, A.W. N. (1907), 173 = 4 A.L.J. 665.

GRIFFIN, J.

References:—20 A. 419, A.W.N. (1902), 68 A.W.N. (1904), 118, 28 A. 246, *R.*

(23) *right of—Talab-i-ishad—Talab-i-mwasibat, performance of—Witnesses to Talab-i-mwasibat, what they are required to bear testimony to.*

To found a valid claim for pre-emption, it is necessary that the pro-emptor should perform the *Talab-i-mwasibat* (immediate claim) and *Talab-i-ishad* (affirmation with witnesses). For the due performance of the latter, it is not essential that the witnesses should be invoked to bear testimony to the fact of the *Talab-i-mwasibat* having been performed; but it is necessary and sufficient, if the witnesses are invoked to bear testimony to the fact of declaration that the *Talab-i-mwasibat* has been already performed. **Udit Narain Lal v. Dasarathi Singh**, 6 C.L.J. 40.

MOOKERJEE and HOLMWOOD, JJ.

Reference:—17 C. 543, *Expl.*

(24) *Price stated in sale-deed alleged to be fictitious—Burden of proof.*

When a plaintiff pre-emptor comes into Court, alleging that the price entered in the sale-deed is fictitious, it rests on him to give some *prima facie* evidence that this is the case. But comparatively slight evidence is sufficient for such purpose, and it will then be for the parties to the sale to show that the price alleged to have been paid was actually paid. **Abdul Majid v.**

Pre-emption.—(Continued).

Amolak, A.W.N. (1907), 202=4 A.L.J. 531=29 A. 618.

AIKMAN and GRIFFIN, JJ.

References:—5 A. 184, 9 A. 225, 9 A. 471, R. 28 A. 617, *not F.*

(25) **Wajib-ul-arz—Sale—whether includes an exchange—re-transfer to vendor's widows—cause of action.**

* Where a *Wajib-ul-arz* provided a right of preemption in case of a sale and, further, that if there was a dispute in the price, it was to be settled by means of *panchait*, held that the words were wide enough and included a transfer by way of exchange (a).

Where the vendor died after the transfer leaving an adopted son, but before the suit for pre-emption was brought, the property was re-transferred to his widows, who were not made parties to the suit, held that the pre-emptor had a good cause of action to maintain the suit. **Bhagwan Singh v. Kharag Singh**, 4 A. L. J. 756=A.W.N. (1907), 280.

KNOX, A.C.J. and RICHARDS J.

Reference:—(a) 7 A. 626, R.

(26)—*by right of vicinage, in respect of house property, whether obtains in Delhi—Pre-emption Act, 1905, S.6.*

The question really in issue between the parties to this suit was whether or not a custom to pre-empt by right of vicinage prevailed in Kucha Aqual Khan, Delhi, where the house in question was situate. Held, the plaintiff having succeeded in proving that the custom obtains generally in Delhi, he was entitled to claim that he has shown it to exist in the particular locality within Delhi, and, also, on a review of authorities and precedents, it was clear that such a custom obtained very generally in the City of Delhi, a Muhammadan City of Muhammadan origin. Held, further, that, for proving the existence of a custom of pre-emption within any specified area forming a sub-division, within the meaning of S. 6 of the Pre-emption Act of 1905, instances of its exercise within that area must be produced, but instances in other neighbouring sub-divisions, and in the city including the area are relevant and useful to strengthen the evidence of the existence of such custom. **Abdulla Beg v. Walaiti Begam**, 120 P.R. 1906=55 P.L.R. 1907.

REID, C.J. and ROBERTSON, J.

Pre-emption.—(Continued).

References:—81 P.R. 1906, 64 P.R. 1887, 17 P.R. 1903, 108 P.R. 1895, R. 68 P.R. 1879, 21 P.R. 1900, D.

(27) **Punjab Pre-emption Act II of 1905—Conditional sales of land under deeds of Baibil wafa, whether subject to pre-emption in case of agricultural lands.**

The Punjab Pre-emption Act makes a distinction between mortgages by conditional sale of agricultural land and of other immovable property, so far as regards their being subject to the exercise of the right of pre-emption. S.4 of the Act limits the right of pre-emption to sales, in the case of agricultural land, and makes foreclosures also subject to pre-emption in the case of other properties. Conditional sales under deeds of *Baibil wafas* executed before Punjab Act II of 1905, relating to agricultural lands could not therefore be properly subject to pre-emption, it being necessary for the mortgagee in such cases to apply for foreclosure. **Ram Pershad v. Hira**, 87 P.R. 1906=65 P.L.R. 1907.

REID, J.

(28) **Wajib-ul-arz—Construction of document—Custom or contract.**

The zamindars of a village in the district of Saharanpur, in a *wajib-ul-arz* attested on the 8th November 1861, declared they would "be bound by and act upon the undermentioned conditions" for thirty years, until the completion of the next settlement. Amongst the "undermentioned conditions" were certain conditions relating to the right of pre-emption. A fresh settlement was commenced in 1890, and in the *wajib-ul-arz* prepared at that settlement it was provided that "as to the remaining customs in the village the record of rights prepared at the former settlement is to be looked at."

Held that the earlier *wajib-ul-arz* recorded, not a custom, but a contract, which came to an end with the term of the settlement, and the later *wajib-ul-arz* could not be construed as the record of a custom after the lapse of only thirty years; there was therefore no right of pre-emption in the village. **Maratib Husain v. Alam Ali**, A.W.N. (1907), 286.

STANLEY, C.J. and BURKITT, J.

(29) **Properties used as residence, used for business also—Use for business purposes not to alter the character of the property.**

Pre-emption.—(Continued).

A suit for possession by pre-emption, of certain premises, in Delhi. The principal use to which the premises were put happened to be that of residence and it was *held* that, though business may be the object of such residence, the properties could not for that reason be deemed to have lost their character as residential properties and to have become mercantile property, entirely, for the purposes of pre-emption. *Held*, further, that, even if the property were shop property, properly so called, it could not be contended successfully that the right to pre-empt is not exercisable in the case of sales of shops at Delhi (a). **Nawal Keshore v. Amir Khan**, 122 P.R. 1906 = 80 P.L.R. 1907.

KENSINGTON and CHITTY, JJ.

Reference :—(a) 81 P.R. 1906, R.

- (30) *Cause of action accruing in father's lifetime—Son's right to claim on death of father—Voluntary transfers—Right of pre-emption over property previously sold.*

A right to sue for pre-emption, which had accrued to a person in his life-time, passes, at his death, to his successors, on their inheriting his land. But a voluntary transfer will not pass a right of pre-emption as regards property previously sold. **Faqir Ali Shah v. Ram Kishen**, 133 P.R. 1907 (F.B.) = 48 P.W.R. 1907.

CLARK, C.J., ROBERTSON & SHAH DIN, JJ.

References :—49 P.R. 1901, 95 P.R. 1901, 7 A. 535, R.

- (31) *Personal covenant for title by vendor in favour of vendee—Right of pre-emptor to enforce the covenant.*

A condition in a deed of sale, in which the vendor guarantees his title in the land, solely to the original vendee, and in which he agrees to compensate the vendee if disturbed, is purely a personal covenant by the vendor in favour of the vendee, and does not, therefore, enure for the benefit of the pre-emptor who succeeds in obtaining a decree for possession by pre-emption. **Sandhe Khan v. Bhana**, 141 P.R. 1907 = 93 P.W.R. 1907.

ROBERTSON and LAL CHAND, JJ.

References :—30 P.R. 1893, 55 P.R. 1899, 46 P.R. 1902, 24 P.R. 1901, 93 P.R. 1902, 96 P.R. 1906, 8 A. 775, 8 A. 86, 3 A. 688, R.

- (32) *Wajib-ul-arz—Interpretation of—Intiqal—Conditional sale.*

A *wajib-ul-arz* recording a custom of pre-emption gave a right of pre-emption in case of any

Pre-emption.—(Continued).

Intiqal of property in the village. *Held*, that a suit for pre-emption in case of a conditional sale was maintainable. **Ram Narain v. Ganga Ram**, 4 A.L.J. 814.

RICHARDS, J.

- (33) *Right of, in regard to kothris attached to shops, obtaining in Katra Nihal Singh, Amritsar.*

Suit to pre-empt, by right of vicinage, certain *kothris* attached to shops in the Amritsar city. The chief contest turned on whether the premises were in Katra Nihal Singh or not and as to that the plaintiff's allegation that the property lay in Katra Nihal Singh was found correct. On the findings in various prior decisions and on the un rebutted evidence let in by the plaintiffs, it was *held* that a custom of pre-emption in regard to shops obtained, on the score of vicinage, in Bazar Papran, Katra Nihal Singh, where the shop's property in dispute lay. **Attar Singh v. Sant Singh**, 13 P.R. 1906 = 99 P.L.R. 1907.

JOHNSTONE and HURRY, JJ.

Reference :—58 P.R. 1900, R.

- (34) *Sale by joint owner of his share—Subsequent "mortgage" of the remaining property by the other joint owner—Mortgage really a sale—Whether latter joint owner has right to pre-emption.*

Where two persons were equal joint owners of a certain property, and one of them sold his share and, subsequently, the other alienated his share, under a transaction, which was alleged to be a mortgage, but was in reality a sale, and there were no circumstances contemplating redemption, the latter joint owner cannot afterwards sue the former for pre-emption, as the plaintiff (latter) is no longer a co-sharer at the date of suit. **Anwar Hasan v. Umatul Karim**, 145 P.R. 1906 = 109 P.L.R. 1907.

JOHNSTONE, J.

References.—100 P.R. 1895, 78 P.R. 1904, D.

- (34-a) *Suit for—Member of the same agricultural tribe as vendor entitled to pre-emption over a mere "agriculturist"—See ACT II OF 1905 (PRE-EMPTION), No. 5, 101 P.R. 1907.*

- (35) *Suit for—Market value, when necessary to determine—See ACT XVIII OF 1876 (OUDH LAWS), No. 4, 10 O.C. 179.*

- (36) *Right of, where pre-emptor and vendee are co-sharers—See ACT I OF 1905 (PRE-EMPTION), No. 2, 83 P.R. 1907.*

Pre-emption.—(Continued).

(37) Malabar Law—Othidar's right of—See MORTGAGE (REDEMPTION), No. 17, 17 M.L.J. 329.

(38) Suit for—See LAND REVENUE CODE (BERAR), No. 3, 3 N.L.R. 84.

(39) Owner of grove land not assessed to revenue cannot resist co-sharer's suit for—See CIV. PRO. CODE, No. 39, 4 A.L.J. 541.

(40) See CUSTOMS (PUNJAB).

(41) Presumption in favour of vicinage—See CUSTOMS (PUNJAB), No. 12, 26 P.R. 1907.

(42) Pre-emptor not intending to retain property after securing it—Right to pre-empt—Instances in neighbouring sub-divisions when relevant—See CUSTOMS (PUNJAB), No. 22, 38 P.W.R. 1907.

(43) Right of—See CIV. PRO. CODE, No. 20, 5 C.L.J. 844.

(44) Suit for—Mortgage of right in the property sought to be pre-empted—Mortgagee obtains a charge—Valid mortgage—See MORTGAGE (GENERAL), No. 4, 4 A.L.J. 57.

(45) Buddhist widow inheriting husband's property—Sale to strangers by husband's co-heirs—See BUDDHIST LAW, No. 1, U.B.R. (1907), Buddhist Law (Inheritance and Pre-emption), 1.

(46) Sale of separate divided share in a survey number—See LAND REVENUE CODE (BERAR), No. 1, 3 N.L.R. 135.

(47) Transfer by co-occupant of divided share in a survey number partly for cash and partly in exchange for other land—Right of pre-emption—See LAND REVENUE CODE (BERAR), No. 2, 3 N.L.R. 138.

(48) Right of purchaser to be compensated for improvements—See CUSTOMS (PUNJAB), No. 40, 722 P.R. 1907.

(49) Sale of land to lessee to take effect after expiry of lease—Limitation for—See LIMITATION ACT, No. 48, 3 N.L.R. 142.

(50)—On sale of agricultural land on ground of vicinage—custom—See CUSTOM (PECULIAR TO PUNJAB), No. 50, 77 P.R. 1906.

(51) Suit for, of Revenue paying land—Incompetency of Court to give decree for possession on payment of amount exceeding its pecuniary jurisdiction—See JURISDICTION (OF CIVIL COURTS), No. 5, 79 P.W.R. 1907.

(52) Alienation of ancestral property with a view to institute speculative suit for—Legal

Pre-emption.—(Concluded).

necessity—Alienee's rights—See CUSTOMS (PUNJAB), No. 21, 65 P.R. 1907.

(53) Inference of custom of—Co-sharer's superior right of—See CUSTOMS (PUNJAB), No. 45, 138 P.R. 1907.

(54) Claim for, of revenue paying land—Powers of Court—See JURISDICTION (OF CIVIL COURTS), No. 4, 73 P.W.R. 1907.

(55)—by right of vicinage, obtaining in case of sale of house property in Amritsar—See CUSTOM (PECULIAR TO PUNJAB), No. 2-a, 140 P.R. 906—95 P.L.R. 1907.

Pre-emption Act (Pun.

See ACT II of 1905.

Presidency Banks Act.

See ACT XI of 1876.

Presumption.

(1) Tenants under inamdars, whether presumed to be tenants with occupancy rights—See LANDLORD AND TENANT, No. 27, 30 M. 502.

Principal and agent.

(1) Agent appointed by administrator—Liability of agent to person entitled to estate.

Where an agent is appointed by the administrator of an estate, in his capacity as such an administrator neither the agent, nor his representative, is liable to be proceeded against, on the contract of agency, by the person entitled to the estate (a), notwithstanding that the administrator obtained letters of administration as attorney of the mother and guardian of the person entitled. **Chidambaram Chetti v. Pichappa Chetty**, 30 M. 243—2 M.L.T. 326.

SUBRAHMANIA Aiyar and MILLER, JJ.

References:—(a) 52 Eng. Rep. 234 and 54 Eng. Rep. 340. F.

(2) *Contract Act (IX of 1872), Ss. 198, 211 and 216—secret profits by the agent—ratification—Res judicata—two appeals from one decree—decrees in appeal drawn up in identical terms—appeal from one decree only.*

The defendant had entered into a contract for sale of merchandise with the plaintiff on his behalf. The defendant supplied his own goods in fulfilment of these contracts, but, when subsequently the goods consigned by the plaintiff arrived, he sold the same to another merchant at a higher rate than the contract rate. The plaintiff claimed the difference

Principal and Agent.—(Continued).

as profits and asked for a settlement of accounts.

The Court of first instance found a certain amount to be due to the plaintiff and decreed the claim in part. Both parties appealed to the District Judge, who dismissed the plaintiff's appeal, and allowed that of the defendants. But the decrees that were drawn up in these appeals were exactly similar. The plaintiff appealed from the decree passed in his appeal. A preliminary objection was taken that the decree in the defendant's appeal having become final, the plaintiff's appeal ought not to be heard.

Held, that there was in fact but one decree settling the accounts between the parties, and the decree in the case in which no appeal was preferred did not operate as *res judicata* and preclude the hearing of the other appeal (a).

Held, further, that the defendants, being the plaintiff's agents, could not be permitted to make any profits out of the plaintiff's goods, and were liable to account to plaintiff for the sale of his goods at a higher rate. It is a well recognised principle of law that an agent is not entitled to make a secret profit by dealing in the business of the agency on his own account.

Duty of agent discussed.

So long as the relation of principal and agent subsists, the principal is entitled to the exercise of the disinterested skill, diligence and zeal of the agent for his exclusive benefit.

There can be no ratification, until the person ratifying comes to know all the material facts. Where the principal did not know, until after the institution of the suit, that the agents had sold to him their goods at a price which was in excess of the market price, he could repudiate the transaction after the institution of the suit.

Damodar Das v. Sheoram Das, 4 A.L.J. 587 = A.W.N. (1907), 245.

RICHARDS and GRIFFIN, JJ.

References:—(a) 33 C. 1101 and 29 M. 333, R.

(3) *Banker and customer—Negligence—Banker's liability to pay for acting on forged letter—Duty of banker—Principal and agent—Fraud of agent against principal will not bind latter.*

Where a plaintiff's suit, against his bankers for the recovery of a certain sum wrongfully paid by them to the plaintiff's clerk, on the production by the latter of a forged letter and

Principal and Agent.—(Continued).

pass book alleged to have been signed by the plaintiff, was decreed in his favour,

Held, confirming the decree, that the clerk was not a general or confidential agent of the plaintiff—as contended by the defendants—and that, the letter being forged and the withdrawal of the money being intended to benefit him alone, the plaintiff could not be asked to bear the loss, even in case the clerk was his agent;

that, where a customer's (plaintiff's) clerk was not his trusted agent or one with any general power of attorney, if the agent, in the course of his employment, committed a fraud, not for his master's benefit, (c) but for his own, and with the intention of cheating and injuring his master, the customer could not be made liable for it, as fraud and forgery were not within the actual scope of such an employment (a).

That a customer was not an insurer that no crime would be committed (b), and that a *fortiori*, when the customer's signature was a forgery, a banker paying such a cheque was not entitled to throw the liability on the customer, (c) as it was the duty of the banker to be acquainted with his customer's handwriting, (d) and as the plaintiff was neither guilty of any negligence in this case nor was it charged against him in the pleading. **Ramasubramony Aiyar v. Krishna Aiyar**, 22 T. L. R. 42.

SADASIVA AIYAR C.J., and EAPEN, J.

References:—(a) 2 K.B. 712 (724, 725, 727), F; 5 H. L. 389 (410 to 413), 21 Q. B. 160 (170 to 176), R; (b) 30 Q.B.D. 525, F; (c) 6 Taunt 76, F; (d) 1 H.L. 158, R; (e) 1 Ch. 599 (611), F. 4 Bing. 253, 2 L.R. Exch. 259, 18 Q.B.D. 714, 1 Sm. L.C. 737, 15 M.L.J. 120, 26 C. 704, 31 C. 249, R.

(3-a) Wagering transaction—Right of agent to recover payment actually made by him—Onus—Proof of agency—See CONTRACT ACT, No. 18, 57 P.W.R. 1907.

(4) Suit by agent for undisclosed principal—Death of agent—Principal not entitled to continue suit, when the representatives of the deceased agent are not brought on record—See Civ. Pro. Code, No. 203, 17 M.L.J. 116.

(5) Broker acting as Principal without knowledge of other party, if can maintain action as Principal—See CONTRACT ACT, No. 44, 11 C. W.N. 609.

Principal and Agent.—(Concluded).

(6) Contract by undisclosed agent—Burden of contract—See SPECIFIC PERFORMANCE, No. 1, 11 C.W.N. 946.

(7) See also AGENT.

Principal and Surety.

(1) Decree against two principal debtors and surety for a certain sum—Decree against principal debtors alone for larger sum including the former sum—Partial satisfaction of decree against the principal debtors alone by rateable distribution under S. 295, C.P.C.—Extent of liability of surety.

In a suit against two principal-debtors and their surety, plaintiff obtained a decree for Rs. 3,000 against all the three, and a decree for Rs. 5,000 (including the Rs. 3,000) against the principal-debtors alone. As there were other creditors of the two principal-debtors, the decree-holder recovered, as against the two, a proportionate amount of his judgment-debt, by rateable distribution under S. 295, Civ. Pro. Code. On the question of the extent of the surety's liability, *held* that the decree-holder is entitled to recover in execution, as against the surety, the total amount of the judgment-debt of the surety, viz., Rs. 3,000 (assuming, of course, that, after allowing for the amount received by the decree-holder in the rateable distribution, Rs. 3,000 or more remains due under the decrees) and that the surety is not entitled to deduct a proportion of the sums recovered by way of rateable distribution, from the amount which is due from him under the decree against him. If the decree-holder had, in execution, obtained the full amount of the decrees attached by him, and the amount of such decrees was less than Rs. 2,000, the surety could not have been heard to say that he was entitled to any deduction from the amount due by him under the decree against him. He ought not to be in a better position because, by reason of the rateable distribution, the decree-holder has only recovered a proportionate amount of the attached decrees. **Appusawmy Iyengar v. Ramanathan Chettiar**, 2 M.L.T. 30 = 30 M. 167.

WHITE, C.J. and WALLIS, J.

(2) Trust deed by mortgagor in favour of a son—Relation between trustee and mortgagor—See TRANSFER OF PROPERTY ACT, No. 10, 17 M.L.J. 87.

Privacy.

Invasion of right of—See EASEMENT, No. 3, 4 A.L.J. 445.

Privy Council.

(1) Interference with decisions of Courts in India in matters of gift—See HINDU LAW (JOINT FAMILY), No. 5, 11 C.W.N. 769.

Probate.

(1)—grant of—Letters of Administration, when should be granted—Will, due execution and attestation—Acknowledgment of execution—Attestation, what is—Costs as to pleaders' fees—Court, power of, as to costs—Executor by implication, what constitutes—Shebait or trustee, if executor by implication—Administration bond, object of taking—Security, sufficiency of—Probate and Administration Act (V of 1881), S. 78—Indian Succession Act (X of 1865), S. 50, Cl. 3—General Rules and Circular Orders.

No grant of probate can be made unless the will has been proved in accordance with law and inasmuch as a grant of probate operates as a judgment *in rem*, the Court must be satisfied that the will has been duly executed and attested (a).

An acknowledgment of execution from the testator and attestation of the will in his presence, is a sufficient attestation under S. 50, cl. 3 of the Indian Succession Act which is made applicable to Hindus by the Hindu Wills Act.

Rule 36, cl. (a) of the General Rules and Circular Orders (Civil) (1903, Vol. 1, p. 142) is applicable to contested applications for probate or letters of administration, the proceedings in which must, according to the provisions of S. 83 of the Probate and Administration Act, take as nearly as may be the form of a suit, according to the provisions of the Code of Civil Procedure, and a Judge has discretion as to costs, on account of pleaders' fees; he may allow a fee according to the valuation of the estate, or according to such a sum, not exceeding the valuation as may be reasonable, or according to the importance of the subject of the dispute (b).

The mere fact that a person is appointed a *shebait* or trustee of the whole or a large portion of the estate of the testator, is not sufficient by itself to constitute him an executor by implication. But where the testator uses the word, trustee or *shebait*, and at the same time imposes upon the person duties involving the functions of an executor, there is a good appointment as executor by necessary implication. In order to constitute one an executor according to the tenor of the will, it must appear on a

Probate.—(Concluded).

reasonable construction thereof, that the testator intended that he should collect his assets, pay his debts and funeral expenses and legacies which are the essential duties of an executor (c).

The appointment of executors by necessary implication is not to be favoured, and the language of the will is not to be strained for this purpose; but in doubtful cases, letters of administration with the will annexed ought to be granted.

S. 78 of the Probate and Administration Act provides that the administration bond is to be given for the due collection getting in, and administering the estate of the deceased. Such security is only required to guard against malpractices, and the security is enough if it affords a reasonable protection against malpractices which require time to be carried out. What the Court is to satisfy itself is, whether the amount of the security affords a sufficient safeguard against serious or continuous mismanagement (d). **Ameer Chand v. Mohanund Bibi**, 6 C.L.J. 453.

MOOKERJEE and HOLMWOOD, JJ.

References :—(a) 31 C. 357, R. (b) 4 C.W.N. 600, *Expt and D.* (c) 1 Ves and B. 422 (466); L.R. 2 P. and D. 379; 3 Sw. and Tr. 562; 3 Curtis 748; 2 Sw. and Tr. 155; 2 Lee 401; 1 Hagg, 80; 4 P.D. 85; (1901) P. 345, (1902) P. 114; (1902) P. 188; L.R. 3 P. and D. 253; 5 C. 756; 26 B. 571; 22 M. 345, R. 6 C.W.N. 310 and 10 C.W.N. 232, D. (d) 1 C.L.J. 180, R.

(2) Application for—when cannot be amended into one for grant of Letters of Administration—See ACT V OF 1881 (PROBATE AND ADMINISTRATION), No. 1, 15 P.W.R. 1907.

Probate and Administration Act.

See ACT V OF 1881.

Procedure.

(1) Enactments relating to—Retrospective effect—Vested right in—See ACT II OF 1906 (MAMLATDAR'S COURTS, BOMBAY,) No. 1, 9 Bom. L.R. 527.

(2) Agreement by plaintiff to take oath or to have the suit dismissed—Failure to take oath—Procedure to be adopted by the Court—See ACT X OF 1873 (OATHS), No. 1-a, 17 M.L.J. 545.

Processions.

Right to take idol in—See RES JUDICATA, No. 9, 4 A.L.J. 333.

Proclamation of sale.

See SALE PROCLAMATION.

Promissory Note.

(1) *Endorsement on—Intention to effect a transfer.*

When the direction to pay is endorsed upon an instrument, which is not negotiable under S. 13 of the Negotiable Instruments Act, so that both are handed over together to the endorsee, the intention to effect a transfer must be inferred, and the endorsement operates as a valid equitable assignment. **Rama Iyen v. Venkatachellam Patter**, 1 M.L.T. 329=16 M. L. J. 554=30 M. 75.

SUBRAHMANIA IYER and MILLER, JJ.

(2) *Signing of—Execution—Proof of.*

If for any reason a promissory note is excluded, the person suing on the note is entitled to succeed on proof of the original consideration, unless it appeared that the case is of the exceptional kind where the promissory note is itself the original cause of action (a). A man may sign a promissory note by getting some one else to write his name for him. **Nga Myat Thin v. Nga Mye**, U.B.R. 1907 (Execution-signing), 1.

SHAW, J. C.

References :—U.B.R. (1892-96), II, 303, 462. R.; (a) U.B.R. (1897-01), II, 391, R.

(3) *Suit for money lent independent of promissory note—Liability of other partners on a promissory note signed by one of the partners.*

Where money is advanced in consideration of a promissory note, a suit for money lent, independently of the note, is not maintainable, if there is no evidence of any intention to create a liability otherwise than under the note (a).

Where a partner of a firm executed a promissory note in consideration of an advance made on account of the joint trade, the other partner who had not signed the note was held not liable, as the promissory note did not purport to have been signed by the partner as partner or on behalf of the firm. **Somasundaram v. Krishnamurthi**, 17 M.L.J. 126.

SUBRAHMANIA IYER and WALLIS, JJ.

References :—7 C. 256 and 10 M. 94, F. See also 15 M.L. J. 84=29 M. 111 and 28 A. 298.

(4) —*Negotiable, suit on—Chose in action, assignment of—must be in writing—Transfer of Property Act, Ss. 130 and 137.*

In a suit by the plaintiff on a negotiable promissory note, executed in favour of the managing

Promissory Note.—(Concluded).

member of his family, it was *held*, (1) that, if the suit was regarded as one on the pro-note, the suit must fail, as there was no endorsement in plaintiff's favour (a); and (2) if the suit be regarded as one by the assignee of the chose-in-action, then the assignment must be in writing as required by S. 180 of the Transfer of Property Act (b).

In the latter case, he could not be regarded as suing on a negotiable instrument, and, therefore, would not come within the exceptions in S. 137 of the Transfer of Property Act. **Arunachala Reddi v. Subba Reddi**, 17 M.L.J. 393.

BENSON and WALLIS, JJ.

References :—(a) 30 M. 88, F; (b) 24 M. 654. R.

(5) Onus of proving non-receipt of consideration and payment of interest—Exorbitant interest, enforceability of—See MORTGAGE (EQUITABLE), No. 1, 53 P.W.R. 1907.

(6) Conditional assignment of non-negotiable, by way of security—Assignee's right to sue in his own name—See ASSIGNMENT, No. 1, 9 P.R. 1907.

Proof.

(1) Statement of a fact in a letter is not proof of the fact itself—See ACT IX OF 1890 (RAILWAYS), No. 6, 9 Bom. L.R. 942.

Prostitute.

(1) Right of, to succeed to her father—See HINDU LAW (SUCCESSION), No. 4, 9 Bom. L.R. 774.

Provincial S. C. Courts Act.

See ACT IX OF 1887.

Public Demands Recovery Act.

See ACT I OF 1895. (BENGAL).

Public Documents.

(1) Entry in the register of inventions—Documents recorded in that register—See ACT V OF 1888 (INVENTION AND DESIGNS), No. 1, 4 A.L.J. 11.

Public Policy.

Compromise decree giving mortgage-decree for debt not secured by mortgage, validity of—See CIV. PROC. CODE, No. 213, 17 M.L.J. 200

Punjab Courts Act.

See ACT XVIII OF 1884 (PUNJAB).

Punjab Laws.

See ACT IV OF 1872 (PUNJAB).

Purchase.

(1)—for value without notice, limits of the doctrine of—See TRANSFER OF PROPERTY ACT, No. 13, 9 Bom. L.R. 388.

Purchaser.

(1) Delay in payment of purchase-money—Liability to pay interest to the vendor—See INSOLVENCY, No. 3, 148 P.R. 1907.

(2) Personal covenant for title by vendor in favour of vendee—Right of pre-emptor to enforce the covenant—See PRE-EMPTION, No. 31, 141 P.R. 1907.

(3)—of a portion of the property charged with the payment of a decree, rights of—Liability of other properties charged—See EXECUTION OF DECREE, No. 4, 10 O.C. 280.

(4)—in execution of mortgage decree—Previous purchaser of mortgagor's right not made a party to the mortgage suit—Right to possession—See MORTGAGE (GENERAL), No. 23, 6 C.L.J. 609.

(5) Mortgagee purchaser, remedy of, in suit against person excluded in mortgage suit—See MORTGAGE (REDEMPTION), No. 18, 6 C.L.J. 612.

(6) Contract to sell immoveable property—Damages for breach of contract—Contract Act, S. 73—See DAMAGES, No. 1, 9 Bom. L.R. 1087.

Puthuval Registry.

(1)—in the name of a junior member—*Marumakkathayam family*—Presumption as to acquisition—Onus.

When Puthuval land is reclaimed and registered in the name of a junior member of a Marumakkathayam family and when there is no evidence to show how it has been acquired or possessed, if it is found that the junior member is in management, joint acquisition is to be presumed, and the onus of proof will be on those who allege separate acquisition. But if not, and there is no evidence as to the investment of joint funds or labour, the acquisition must be presumed to belong to the junior member who is the registry holder. The presumption in each case will indicate on whom lies the burden of proof. **Raman Govindan v. Parvathi Pillai Devi Pillai**, 22 T.L.R. 178.

SADASIIVA IYER, C.J., GOVINDA PILLAI & HUNT, JJ.

Pyatpaing.

Admissibility of, in evidence—See EVIDENCE ACT, No. 28, 3 L.B.R. 250.

Railway accident.

(1) Evidence as to negligence—Admission of further evidence in appeal—See CIV. PRO. CODE, No. 289, 11 C.W.N. 721.

Railway Company.

(1) Non-delivery of goods by, suit for compensation for, applicability of Art. 31 of the Limitation Act to—See LIMITATION ACT (XV OF 1877,) No. 62, 103 P.R. 1906=2 P.L.R. 1907=30 P.W.R. 1907.

(2) Receipt of goods by one Railway Company for carriage over its own and another Company's land—Liability in respect of over charge made by delivering company—Bye-laws—Power of Railway Company to alter the principle of calculation of rates—See CONTRACT, No. 1, 2 M.L.T. 42.

Railways Act.

See ACT IX OF 1890.

Receiver.

(1) Sale by, by order of Court—Right of a party to suit to challenge validity of sale in a separate suit—Shebait of Thakur, a party—Right of succeeding Shebait to recover property sold—Representation of Thakur by Shebait—Continuing representation—Application in suit to set aside sale—Maintainability.

A sale of properties, the subject-matter of a suit, by the Receiver, under the order of the Court, cannot, in the absence of fraud, be attacked collaterally by persons, who were parties thereto, or their representatives (a).

Where one member of a joint Hindu family sued for partition of certain properties, on the allegation that they were secular properties of the family, and another resisted it on the ground that the properties were the absolute *debutter* properties of the family idol, of which he was the *shebait*, and a receiver was appointed in that suit, and he, under the direction of the Court, sold certain portions of the properties to meet the costs of the suit,

held, in a suit brought to recover the properties sold, by persons claiming to be successors in office of the *shebait*, that the substantial question raised in the former suit was as to the real character of the properties sold and the Thakur was represented in it in the only manner possible, *viz.*, by the *shebait*. The succeeding *shebait*s, forming a continuing representation of the Thakur's property, were bound by the order for sale, which it was not

Receiver.—(Concluded).

open to them to challenge in an independent action (b).

Quære—Whether, having regard to the purpose for which the properties were sold, an application in the former suit to set aside the order, would have succeeded. **Gora Chand Lurki v. Makhan Lal Chakravartty**, 11 C.W. N. 489=6 C.L.J. 404.

MOOKERJEE and HOLMWOOD, JJ.

References :—(a) 6 B. L. R. 486, referred to. (b) 2 I. A. 145 (152) ; 8 C. W. N. 809=31 I. A. 203 (210) ; 13 M. I. A. 270 (275) ; 9 C. W. N. 961=32 I. A. 193 ; 2 C. L. J. 189, *relied on*.

(2) Dismissal of suit in which Receiver was appointed—Effect on Receiver's powers.

Although, where a Receiver has been appointed in a suit, the Court usually directs, at the instance of the parties or of some of them, that the Receiver should pass his final accounts and then be discharged, the Court has no power, after the suit has been dismissed, to give the Receiver any fresh power, such as liberty to sell. **Rabeholme v. Smith**, 54 C. 336.

MACLEAN, C.J., HARRINGTON and GEIDT, JJ.

(3)—if may sue in his own name—District Judge, sanction of, to the appointment of Receiver—Subsequently obtained sanction, whether validates proceedings commenced—See CIV. PRO. CODE, No. 242, 5 C.L.J. 270.

(4)—Court's power to appoint—See TRANSFER OF PROPERTY ACT, No. 8, 2 M.L.T. 167.

(5)—possession of property outside Presidency—Power of Insolvent Debtors Court at Bombay to direct receiver to hand over assets to official assignee—See JURISDICTION (GENERAL), No. 1, 9 Bom. L.R. 1093.

(6) Application for appointment of,—Conditions necessary for appointing—See CIV. PRO. CODE, No. 241, 10 O.C. 268.

(7) Suit by receiver for debt due to a person—Right to set up defence of set-off—See CIV. PRO. CODE, No. 80, 17 M.L.J. 481.

(8) Suit against receiver—Leave to sue whether necessary—See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), No. 15, 17 M.L.J. 483.

Record of Rights.

(1) Entry in, effect of—Possession, suit for—Limitation.

The only effect which can be attributed to an entry in the Record of Rights is that it is to be presumed correct till the contrary is proved.

Record of Rights.—(Concluded).

The Bengal Tenancy Act does not lay down that the entry is to be taken as conclusive upon the question of title, till a contrary decision has been given by the Civil Court. Hence the plaintiff is not bound to bring a suit for possession within one year from the date on which the entry of the defendant's name was made in the Record of Rights. **Rafi Sahawan Misser v. Bachu Misser**, 6-C.L.J. 670.

MOOKERJEE and CASPERSZ, JJ.

References:—11 C.W.N. 48, 30 C. 20, II; 25 B. 337 = 27 I. A. 215, *Expl.*

(2) Necessity to annex record-of-rights extract to application to file award—See CIV. PRO. CODE, No. 258, 9 Bom. L.R. 885.

Reference.

(1)—to Chief Court, grounds of—See CIV. PRO. CODE, No. 236, 3 L.B.R. 255.

(2) Proceeding in Revenue Court having jurisdiction—Commissioner on appeal holding the case not proved, but suggesting registration of Revenue Court's decree as that of Civil Court—Commissioner's power of reference—Chief Court's powers—See ACT XVI OF 1887 (PUNJAB TENANCY), No. 13, 45 P.R. 1907.

* (3) Reference to Full Bench by Division Bench of the Travancore High Court—See MAHOMEDAN LAW, (GIFT), No. 1, 22 T.L.R. 239 (F.B.)

Registered deed.

(1) Gift by Mahomedan under registered instrument—Applicability of Mahomedan Law—Delivery of possession, whether necessary—See MAHOMEDAN LAW (GIFT), No. 4, 17 M.L.J. 562.

Registrar.

District Registrar not a Court—See CIV. PRO. CODE, No. 305, 17 M.L.J. 313.

Registration.

(1) Non-delivery of document by executant to execute after registration, effect of—Validity of such document—Transaction whether completed.

Suit on a mortgage deed executed by defendant to plaintiff. The deed was presented for registration by the defendant and registered at his instance, but it was not delivered to plaintiff. The contention of the defendant was that the deed was invalid for want of delivery; *held*, there is no provision of law in this country requiring that a registered deed shall not operate

Registration.—(Concluded).

until it is delivered to the person claiming under it. Further, the presentation of such document by the party executing it to the registration Officer and its subsequent registration must be regarded as equivalent to the formality of delivery prescribed for writings under seal by the law of England. **Kanshi Ram v. Tota Ram**, 40 P.R. 1906 = 78 P.L.R. 1907.

JOHNSTONE and RATTIGAN, JJ.

(2) Effect of, on failure of prior mortgagee to get possession of title deeds—Delay in—See TRANSFER OF PROPERTY ACT, No. 47, 17 M.L.J. 499.

(3) Suit for money advanced to minor—Registration of bond executed by guardian—Extension of period of limitation—See LIMITATION ACT, No. 66, 10 O.C. 38.

(4) Unregistered document—Value of property not specified in the deed, but exceeds Rs. 100—Whether valid—See TRANSFER OF PROPERTY ACT, No. 3, 10 O.C. 277.

Registration Act (III of 1877).

(1) *Splitting up of a transaction, validity of.*

Where a person borrowed Rs. 198 and executed two unregistered mortgage bonds for Rs. 99 each on the same date, *held*, that, as there was nothing in the Act which forbade the splitting up of a transaction in this manner, the bonds were valid. **Ramji Mal v. Chotte Lal**, 3 A.L.J. 661 = A.W.N. (1906), 281 = 29 A. 50.

STANLEY, C.J. and RUSTOMJEE, J.

(2) S. 17. (b)—Award effecting partition of immoveable property—See CIV. PRO. CODE, No. 250, 84 P. R. 1907.

(3) S. 17, Cls. (b), (c) and (n)—Registrable documents—Mortgage—Satisfaction.

Instruments, acknowledging receipt of money paid in satisfaction of such a right as is referred to in cl. (b) to S. 17 of the Registration Act, and not acknowledging receipt of moneys paid as the consideration for the extinction of such a right by a new act of will, are not compulsorily registrable. Similarly, endorsements of receipts, acknowledging satisfaction of a mortgage by the payment of the whole mortgage money, are not compulsorily registrable under cl. (n) of the section. The cl. (n) indicates that an operative instrument, which not merely evidences the satisfaction of a mortgage, but which is a transaction, annulling an interest by a new act of will between the parties, is compulsorily registrable. The distinction is as follows:

Registration Act (III of 1877).—(Continued).

a payment made in discharge of an existing obligation, as in paying off a mortgage debt, according to its tenour, is a payment made in satisfaction of that obligation—and is not technically "consideration" paid in order to obtain the extinction of that obligation. In other words, the extinction of an obligation, when it is effected by the performance or satisfaction of the obligation according to its terms, follows from the terms of that obligation, and is not induced by any new consideration.

Neither cl. (c) nor cl. (n) of the section requires registration, in respect of the mere satisfaction or performance of the pre-existing obligation. These clauses require registration, only when money is paid as consideration for a novation or a new agreement by a fresh act of the parties, the effect of which is to do away with the old obligation, not by accepting performance thereof, but on receiving a sum paid for the benefit of the new agreement. **Mahamad Kasam v. Ranu Yesji Naik**, 9 Bom. L.R. 254.

BATTY AND PRATT, JJ.

Reference :—19 M. 288, R.

(3-a) Ss. 17 (b), 49—Award by arbitrator, making partition of immovable property of over Rs. 100, compulsorily registrable—Secondary evidence of, inadmissible under S. 91, Evidence Act.

Where two co-parceners, by agreement, appointed a sole arbitrator to effect a partition of their joint ancestral property and consented that the partition effected by the arbitrator, by taking the bids of the parties for the property, will be accepted, and the award was thereon made and written up on the back of the said agreement (which was not registered), held, that the document was intended to be, and was regarded by the parties as, an instrument declaring rights in or to immovable property and that, since it did 'operate to declare' such rights in immovable property of value exceeding Rs. 100, it was an instrument compulsorily registrable, and being unregistered, not receivable in evidence and that further, by reason of S. 91 of the Indian Evidence Act, it was not open to the parties to prove the partition, independently of the document, by oral evidence *alimunde*. **Azimat Singh v. Kalwant Singh**, 71 P.R. 1906=111 P.L.R. 1907.

JOHNSTONE AND RATTIGAN, JJ.

References.—4 B. 126, 13 M. 255, 9 A. 108, 48 P.R. 1905, 175 P.L.R. 1905, D.

Registration Act (III of 1877).—(Continued).

(4) S. 17 (d)—Petition of compromise containing a recital of a previous oral agreement for lease—Stamp—Registration—Evidence.

Where a petition of compromise merely contained a recital of a previous oral agreement for lease :

Held—that it did not require registration or stamp.

It was evidence of an oral agreement, but not, an agreement in itself. **Pitambar Gain v. Uddhab Mondal**, 12 C.W.N. 59.

RAMPINI, C.J., and SHARFUDDIN, J.

(5) S. 17 (h)—Power of appointment—Appointment of new trustee in place of a dying trustee, under power reserved by the deed—Registration—Indian Trusts Act (II of 1882) Ss. 1, 75—Property dedicated to charitable uses—Construction of document Originating summons—Certifying Counsel—Taxation of costs—Practice.

An indenture of trust contained the following clause, by which, the settlors reserved to themselves and the survivor of them the right to nominate and appoint trustee or trustees, in the place of retiring or dying trustee or trustees :—

"It shall be lawful for.....to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, or going to reside abroad, or desiring to retire, or refusing, or becoming incapable, to act as aforesaid, with liberty upon any such appointment to increase or diminish the original number of trustees, and upon every such appointment the trust premises hereby settled shall be so transferred as to become vested in the new trustee or trustees."

On the death of one of the trustees, the surviving settlor, in exercise of this power, appointed a new trustee : this deed of appointment was not registered. Subsequently, the surviving settlor, in exercise of power reserved, appointed three additional trustees by deeds of appointment bearing different dates.

The surviving settlor died : and at her death, without leaving progeny, the whole of the trust property was to be utilised for charitable uses and purposes, as provided by the deed of settlement.

The two questions that were submitted to the Court for opinion were : (1) Whether the deed appointing the new trustee required registration ;

Registration Act (III of 1877).—(Continued).

and (2) Whether the additional trustees were validly appointed:—

Held, (1) that the deed of appointment did not require registration. The provisions of the Indian Trusts Act not applying to the settlement which became one in favour of charity on the death of the settlor, the trust property did not vest in the new trustee by mere operation of law. The deed of appointment by itself created no interest in the property, but merely gave him the right to obtain another document.

(2) That the words "upon any such appointment" in the clause, were not words that absolutely governed the surviving settlor's right to increase the number of trustees; they merely indicated the occasion when she may exercise her right, but the right to increase the number of trustees existed. She was, therefore, entitled to increase the number of trustees whenever she chose to do so.

In an originating summons, parties are entitled to instruct counsel: and without any certificate the costs of one Counsel must be allowed on taxation. **Fatmabibi v. Shaik Hassan**, 9 Bom. L.R. 1071.

DAVAR, J.

* (6) S. 17—Documents which are compulsorily registrable but unregistered—Evidence for collateral purposes—See EVIDENCE, No. 3, 9 Bom. L.R. 393.

(7) S. 17—Registration of petition of compromise—See COMPROMISE DECREE, No. 3, 5 C.L.J. 611.

(8) Ss. 17, 23, 34, 49 and 77—*Indian Evidence Act*, S. 91—*Suit to enforce registration—Registration invalid—Personal covenant on the loan.*

Plaintiff instituted a suit for an order to the Sub-Registrar to register a deed of mortgage executed to him by the defendants for money lent, and obtained a decree to the effect, that the defendants "do perform their part of the contract in registering the mortgage bond by appearing within one month after date of the decree before the Sub-Registrar and admitting execution and receipt of consideration therefor; and the Sub-Registrar do on application register the deed, whether the signatories admitted execution and receipt of consideration or not."

The deed was registered in accordance with the decree, though it was not presented for registration within the 30 days as directed by the decree.

Registration Act (III of 1877).—(Continued).

In a suit on the mortgage deed for sale of the mortgaged property, it was held, (1) that as the first suit was not brought under the conditions required for the filing of a suit under S. 77 of the Registration Act, the decree obtained in that case would not have the effect of exempting the document registered under it from the necessity of compliance with the provisions of the Act, (2) that it was competent to the Court to decide as to the validity of the registration, (3) that, as the document in the case was not registered in accordance with the provisions of Ss. 23 and 34 of the Act, it could not be received in evidence for affecting the mortgaged property as provided by S. 49 of the Act, (4) that the plaintiff was precluded by S. 91. Ev. Act from proving the existence of the mortgage by any other evidence than the mortgage deed, (5) and that as the deed contained a personal covenant to repay the debt a personal decree for the amount might be passed. **Maung Kyaw and Ma San Hmwe v. Sithambaram Chetty**, 4 L.B.R. 88.

IRWIN and HORTNOLL, JJ.

References:—3 A. 397, 9 C. 150, 11 Bur. L.R. 166, 20 A. 512, F'; 2 A. 46, 16 A. 303, 2 I. A. 210, 2 C. L.R. 428, F.

(8-a) Sections 17 and 49—*Aposhnama* setting off one decree against another—Registration—Admissibility in evidence—See TRANSFER OF PROPERTY ACT, No. 82, 11 C.W.N. 342.

(9) Ss. 17 and 49—Registration of sale deed in Berar—See SALE, No. 2, 8 N.L.R. 72.

(10) Ss. 17 and 49—Unregistered lease—Admissibility to prove adverse possession—See LIMITATION, No. 5, 17 M.L.J. 469.

(10-a) S. 23—See No. 8, *supra*.

(10-b) S. 34—See No. 8, *supra*.

(11) Ss. 35, 73, 74, 75 and 87—*Registration of document under orders of District Registrar—time for presentation, extension of—Procedure, defect of—Registration after fixed period, effect of—Indian Limitation Act (XV of 1877), S. 5, if applies to Registration Act—Registration, invalidity of, may be impeached by a person interested, though no party to the deed.*

The Registering officer has no jurisdiction to register a document, presented after the lapse of thirty days from the date of the order passed by the District Registrar, under the first paragraph of S. 75 of the Registration Act, even if the time for such presentation is extended by a

Registration Act (III of 1877).—(Continued).

subsequent order of the District Registrar. It is not a mere matter of procedure.

A document, registered after the said period of thirty days, is not validly registered, and creates no title (a).

The order of the District Registrar, directing the registration of a document, after the lapse of thirty days from the date of the order passed by him under the first paragraph of S. 75 of the Registration Act, is *ultra vires*.

S. 5 of the Limitation Act has no application to such a case, and time for registration cannot be extended under the section.

Where a person is affected by a deed, which he impeaches as not duly registered, it is open to him to take the objection, although he was no party to the deed (b). **Babān Sahai v. Udit Narain alias Nand Kishore Lal**, 5 C.L.J. 188.

GEIDT, J.

References:—(a) 2 I.A. 210=15 B.L.R. 228. 4 I.A. 166=1 A. 465, D., 23 A. 293, R. (b) 32 I. A. 113=27 A. 271, D.

(12) S. 48—Application of doctrine of notice—See **SALE**, No. 3, 4 L.B.R. 26.

(13) Ss. 48 and 50—Oral agreement—Subsequent registered agreement—Notice—Priority—Specific performance—Delivery of possession whether necessary.

The equitable doctrine that a subsequent registered sale-deed cannot be pleaded as a defence to a suit for specific performance on a prior unregistered document under S. 50 of the Act, if the holder of the registered document has notice of the latter, is equally applicable to a prior oral agreement to sell under S. 48 of the Act (a).

The provision as to delivery in S. 48 of the Act does not preclude the party to the oral agreement from relying on the doctrine of notice, when there has been no delivery of possession. **Thimmajamma v. Abdulla Sahib**, 17 M.L.J. 319.

WHITE C.J., and MILLER, J.

Reference:—(a) 25 M.L. R.

(14) S. 49—Unregistered mortgage deed with implied personal covenant to repay—Suit to enforce personal obligation—Admissibility of deed in evidence.

A mortgage deed, which, by law, is required to be registered, can be used in evidence, in a suit to enforce an implied personal covenant to the money advanced, although the same

Registration Act (III of 1877).—(Continued).

could not be used as evidence in a mortgage suit. **Myat Thin v. P. C. V. E. Kasu Visvanthay Chetty**, 4 L.B.R. 52.

FOX, C. J.

References:—15 M. 396, 9 C. 520, P.J.L.B. 124 (1894), F'

(15) S. 49—Agreement to give lease unregistered—Admissibility of, in evidence in suit for specific performance.

In a suit for specific performance of an agreement to give a lease, the document containing the lease does not require registration, to be admissible in evidence, where it is only used for the purpose of proving the contract, for the breach of which the action is brought. **Srinivasacharyulu v. Venkataraju**, 17 M.L.J. 218.

BENSON and WALLIS, JJ.

Reference:—17 M. 456, F'.

(15-a) S. 49—See No. 8, *supra*.

(16) Ss. 58, 59, and 60—Document—Secondary evidence—Fact mentioned in endorsement may be proved.

Ss. 58, 59 and 60 of the Registration Act provide that the facts mentioned in the endorsements may be proved by those endorsements, provided the provisions of S. 60 have been complied with. **Thama v. Govind Bilal**, 9 Bom. L. R. 401.

JENKINS, C. J., and KHAREGHAT, J.

(16-a) S. 59—See No. 16, *supra*.

(16-b) S. 60—See No. 16, *supra*.

(16-c) S. 73—See No. 11, *supra*.

(16-d) S. 74—See No. 11, *supra*.

(16-e) S. 75—See No. 11, *supra*.

(17) Ss. 76 and 77—Registration—Suit to compel registration—Grounds of such suit.

Where a Registrar refused to register a document presented to him, upon the grounds that there was not sufficient proof that the document was executed by the authority of the alleged executant, and that there was undue and unexplained delay in presenting the document for registration, it was held that a suit would lie under section 77 of the Indian Registration Act, 1877, to compel registration.

Held also that, in a suit under S. 77 of the Registration Act, the Court is only concerned with the genuineness of the document sought to be registered, and not with its validity.

Registration Act (III of 1877).—(Concluded).

Kanhaya Lal v. Sardar Singh, A.W.N. (1907), 46=4 A.L.J. 171=29 A. 284.

KNOX and RICHARDS, JJ.

References :—25 C. 93, 24 C. 668, R.

(18) S. 77—Suit to direct registration of will disposing of property worth more than Rs. 2,500—Jurisdiction of Munsiff's Court—See JURISDICTION (OF MUNSIFF'S COURTS), No. 1, 17 M.L.J. 573.

(19) S. 77—See Nos. 8 and 17, *supra*.

(20) S. 87—See No. 11, *supra*.

Regulation XXVII of 1793.

(1) Right of zamindar to establish market on his own land—Regulation VI of 1822, S. 9—See MARKET, No. 1, A.W.N. (1907), 248.

(2) S. 41—Chowkidari Chakran lands—Resumption and settlement with Zemindar—Resumed land if forms a separate estate—See ACT VI OF 1870 (VILLAGE CHOWKIDARS, BENGAL) No. 1, 11 C.W.N. 201.

Regulation Y of 1799 (N.W.P.)

(1) S. 7—*Suit against Secretary of State before the property of a deceased vested in him—premature.*

A District Judge, purporting to act under S. 7 of Regulation Y of 1799, took possession of the property of a deceased person, whose property was not claimed by any person. A creditor of the deceased brought a suit for recovery of his dues against the Secretary of State. *Held*, that the liability of the Secretary of State does not arise, unless property vests in him under the Regulation. **Ram Narain Dube v. The Secretary of State for India**, 4 A.L.J. 144=A.W.N. (1907), 66=29 A. 277.

KNOX and RICHARDS, JJ.

Regulation Y of 1804 (Madras) (as amended by Act IV of 1899).

(1) S. 35—Rule 7 of rules framed under, *Transfer of execution to the Collector—Reference by Collector to District Judge—Order of District Judge—Effect of Government order rescinding notification empowering Collector to execute decrees.*

A Collector, who was empowered by notification issued by Government under the Regulation, and to whom a decree was transferred for execution, made a reference under Rule 7 of rules framed under S. 35 to the District Judge. The District Judge passed a decision against which an appeal was pending. Since the Dis-

Regulation Y of 1804 (Madras)—(Concluded).

trict Judge's decision, the Government had by a notification rescinded its order providing for the transfer of execution of decrees to that Collector.

Held that, under the circumstances, the proper course for the High Court to adopt would be to set aside the order of the District Judge, without prejudice to the parties raising the question in dispute, in execution of the decree in a Civil Court. **Pulabaiyagari Munisami Chetty v. The Rajah of Karvetnagar**, 30 M. 193.

SUBRAHMANIA AYYAR and MILLER, JJ.

Regulation XVII of 1806. (Bengal).

(1) *Mortgage by conditional sale—Validity of notice of foreclosure—Appeal—Objection to notice made, on appeal, for the first time.*

A notice issued under S. 8 of the Regulation cannot be held to be defective simply because (1) the area of land and *khasra* and *khewat* numbers were entered neither in the notice nor in the application for its issue, (2) the amounts of principal and interest were not specified in the notice, and (3) the signature of the Judge on the notice was not his proper official signature, the official designation being in print instead of being in the Judge's own hand.

Where a defendant, in a suit for possession of immovable property, on a deed of conditional sale, alleged to have been foreclosed under the Regulation, had practically admitted the validity of a notice issued under the Regulation, it is doubtful whether the defendant is entitled on appeal to raise, for the first time, objections to the validity of the notice (a). **Bhagirath v. Nath Mal**, 105 P.R. 1907.

JOHNSTONE and RATTIGAN, JJ.

References :—(a) 16 P.R. 1888, 11 C. 111 (P.C), R.

(2) Effect of absence of notice of foreclosure under—See MORTGAGE (FORECLOSURE), No. 3, 46 P.R. 1907.

(3) Ss. 7 and 8—Mortgage by way of conditional sale, foreclosure of—See TRANSFER OF PROPERTY ACT, No. 69, 157 P.L.R. 1906=2 P. R. (1907).

(4) S. 8—*Redemption proceedings—Right when lost.*

Before a mortgagor in a case of mortgage by conditional sale, executed before the Act of 1882, could be held to have entirely lost his

Regulation XVII of 1806 (Bengal).—(Concl'd).

right to redeem under the Regulation XVII of 1806, it must be proved that the procedure prescribed therein had been strictly followed, *e. g.*, it must be proved that there was a previous demand by the mortgagee from the mortgagor of payment of the mortgage-debt. Where, therefore, the mortgagee produced a copy of the proceedings, which directed him to bring a suit, *held* that there was not sufficient compliance with the Regulation XVII of 1806 and the mortgagor did not lose his right to redeem. **Badal Ram v. Taj Ali**, 4 A.L.J. 717 = A.W.N. (1907), 266.

AIKMAN and GRIFFIN, JJ.

Reference :—(1868) N.W.P. 358, R.

- (5) S. 8—*Mortgage by conditional sale—Foreclosure—Parwanah—“Official signature”—Procedure.*

Held that a *parwanah*, or notification to the mortgagor, issued in a suit for foreclosure of a mortgage by conditional sale under the provisions of section 8 of Regulation XVII of 1806, which bore the seal of the Court and the initials of the Judge of the Court from which it issued, was a good and sufficient notification within the meaning of the Regulation. **Bhaghat Kuri v. Baldeo Rai**, A.W.N. (1906), 309 = 29 A. 145.

STANLEY, C.J. and BURKITT, J.

References.—11 C. 111, D., 16 A. 59, *quoad hoc* overruled.

- (6) S. 8, demand of mortgage money under, whether could be made within period of payment in the deed—See MORTGAGE (FORECLOSURE), No. 4, 119 P.R. 1906.

- (7) S. 8—Stipulated period, meaning of—Application of regulation—See MORTGAGE (FORECLOSURE), No. 2, 70 P.R. 1907.

Regulation XIX of 1810.

- (1) Endowments affected by, management of—See RELIGIOUS ENDOWMENTS, No. 3, 34 C. 587.

Regulation VIII of 1819 (Putni).

- (1) *Notice—Irregularity—Sale, setting aside.*

In a suit to set aside a sale held under the Putni Regulation, it was found that the notices were stuck up in the Collector's Office Board, outside the Court, from 10 A. M. to 5 P. M., and were not put up at all on Sundays.

Held that this was a sufficient compliance with the terms of the Regulation (a). **Sachi**

Regulation VIII of 1819 (Putni).—(Concl'd).

Nandan Dutta v. Maharaj Bejoy Chand Mahatap Bahadur, 11 C.W.N. 729.

BRETT and GUPTA, JJ.

Reference.—(a) 32 C. 953, *Expl.* and D.

Regulation VII of 1822.

- (1) Right of zamindar to establish market and to collect cesses, &c., on his own land—See MARKET, No. 1, A.W.N. (1907), 248.

Regulation VII of 1828.

Order confirming sale under Act II of 1864 (Madras Revenue Recovery) by Head Assistant Collector by virtue of powers given him by Regulation—Effect of such order—See Act II of 1864 (MADRAS REVENUE RECOVERY), No. 1. 2 M.L.T. 328.

Regulation VII of 1832.

- (1) S. 9—Effect of apostacy—See HINDU LAW (CONVERSION), No. 1, 4 A.L.J. 365.

Regulation VII of 1901 (North-West Frontier Province).

- (1) Jurisdiction of Chief Court, Punjab, to hear appeal from North-West Frontier Province—See JURISDICTION (OF HIGH COURTS), No. 1, 50 P.R. 1907.

Release.

- (1) Effect of general words of, in a deed—See PARTNERS, No. 1, 11 C.W.N. 776.

Religious Endowments.

- (1) *Hindu Temple—Scheme for management—Prevention of waste and misappropriation—Mahant—Authority—Accountability—Treasurer and auditor, appointment of—Surplus funds, dealings with—Alienation of property, restrictions as to—Power of High Court to modify scheme when necessary—Liberty to apply—Costs.*

Suit instituted for the purpose of having a scheme settled for the management of a Hindu temple and the protection of its funds from waste and embezzlement. The scheme settled by the High Court was objected to on the grounds, (1) that its effect would be to lower the position of the Mahant and weaken his authority and (2) that, although there was no surplus in hand, nor any immediate prospect of a surplus, it provided for the application of surplus revenue, devoting it to objects, which, though admirable in themselves were foreign to the purposes of the institution. These provisions, it was pointed out, were unnecessary at

Religious Endowments.—(Continued).

present and likely to prove embarrassing in the future.

The Judicial Committee, on appeal, settled a scheme, so as to meet the exigencies of the case without impairing the authority of the Mahant as the duly constituted manager of the institution. The scheme provides *inter alia* for the appointment, by the District Court, of a treasurer to have custody of the funds. Rules to be framed by the District Court (with power to vary same from time to time), to ensure proper receipt and custody of income and funds and investment of surplus, to prevent misappropriation and ensure proper management of temple properties. The treasurer to put the manager in funds for all disbursements, in accordance with a budget to be prepared by the Mahant, and submitted to the District Court, two months prior to the commencement of every year—and for any further expenditure deemed necessary by the Mahant, but, unless with the leave of the District Court, such further expenditure not to exceed Rs. 5,000 during any one year. The Mahant to file in Court a detailed account of receipts and disbursements of each year, within three months after its close. Accounts to be audited by an auditor appointed by the District Court, and published in a suitable manner. Surplus income to be invested for the benefit of the temple. Restrictions placed on the alienation of immovable property, jewels and other property of value. Subject to the scheme, the position of the Mahant to remain as before. Liberty to the Mahant and any person interested to apply to the District Court, with reference to the carrying out of the directions of the scheme, and to the High Court for any modification of the scheme, that may appear necessary or convenient. **Prayaga Das Jee Yaru v. Tirumala Khandam Pillai Purisa Sri-ranga Charylu Yaru**, 11 C. W. N. 442 (P.C.)=2 M.L.T. 119=17 M.L.J. 236=30 M. 138=9 Bom. L.R. 588.

LORD MACNAGHTEN, LORD ATKINSON, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

(2) *Heads of Mutt—Powers of alienation—Extravagant personal expenditure not binding on the Mutt property.*

The income of a Mutt was Rs. 20,000, of which Rs. 10,000 was required for the maintenance, properly so called, of the Mutt and the balance of Rs. 10,000 was at the disposal of the Pandarasannidhi for his personal expense. The

Religious Endowments.—(Continued).

Pandarasannidhi had to go on a journey of 50 miles to Madura for 10 or 14 days to give evidence in a certain suit. He took with him Rs. 300 and borrowed Rs. 1,500 at Madura, merely stating that it was required for the purposes of the Mutt. The plaintiff sued the Pandarasannidhi for the amount of Rs. 1,500. He died during the hearing of the suit and the present head of the Mutt was brought in as second defendant. It was held that the debt could not be regarded as binding upon the property of the Mutt or its income in the hands of his successor, and that the decree against the second defendant should be restricted to the personal assets of the late Pandarasannidhi in his hands.

Per BENSON, J.—Heads of Mutt cannot alienate or charge the corpus or income beyond their own life-time, except for the purposes necessary for the maintenance of the Mutt as such (a).

It is true that a Pandarasannidhi has to maintain a certain amount of state, but such maintenance should be made out of the current income and should not be considered a sufficient reason for encumbering the Mutt property or binding the income in the hands of the borrower's successor.

Per WALLIS, J.—Heads of Mutt cannot, in any view, exceed the powers of alienation of a limited owner, as defined in *Hanooman Persaud Panday v. Musumal Babooe Munraj Koonwero* (b). **Srimath Dalvasigamony Pandara Sannidhi alias Nataraja Desika Pandara Sannidhi v. Kuppasawmi**, 17 M.L.J. 40.

BENSON and WALLIS, JJ.

References :—(a) 27 M. 435, F. 2 M. 175, commented upon. (b) 6 M.L.A. 393, *Appl.*

(3) *Endowments affected by regulation XIX of 1810, management of—Removal of trustee for misconduct—Act XX of 1863, Ss. 3, 7, 14 and 18.*

The object of Act XX of 1863 was to relieve the Boards of Revenue and Local Agents from the duties imposed on them by Reg. XIX of 1810, and, in order that any action may be taken under this Act, S. 3 of the Act requires that the provisions of the Regulations specified in the preamble to that Act should be applicable to the endowment which is the subject of the suit, and that the nomination of trustees, etc., should either be vested in or be exercisable by the Government at the time of the passing of the Act.

Religious Endowment.—(Continued).

Where the question was about the management of a certain religious endowment in Cuttack, and it was admitted that, in 1864, the Local Government appointed a Committee of three members under S. 7 of the Act, held that such appointment was a clear indication of the fact that that endowment was under the management of the Board of Revenue before the passing of the Act of 1863, and that the fact that an endowment had come under the management of the Board of Revenue was sufficient to characterise it as a public endowment and as one falling within the operations of this Act (a). It was also held that all endowments which were effected by Reg. XIX of 1810, whether they come under the Board of Revenue or not, fall within the purview of Act XX of 1863 (b).

For the operation of this Act, it is immaterial whether the office of the trustee or manager is hereditary or not, and, in either case, a trustee or manager, who misconducts himself and acts contrary to the object of the endowment, can be dealt with under the provisions of this Act (c).

Where the Court finds that a trustee was guilty of misconduct in the management of the endowment, an order by the Court directing him to execute a bond with sureties, in order to ensure better management for the future, is legal (d). **Mahomed Athar v. Rajman Khan**, 34 C. 587.

BRETT and SHARFUDDIN, JJ.

References :—(a) 8 W.R. 313, F; (b) 18 A. 227; 5 B.L.R. App. 55; 7 C. 767, R, 26 M. 166, F. (c) 2 M. 197, F. (d) 14 M. 103, F.

(4) *Temple trustee, whether public trustee—Personal liability for debt.*

The fact that a temple trustee borrowed for the purposes of the temple does not affect his liability to the person, who lent the money to him, such a trustee not being a public trustee. **Pasupathi Pillai v. Sundarappier**, 2 M.L.T. 268.

SUBRAHMANYA AIYAR, J.

(5) *Hindu Law—Religious Endowment—Sangat Nanak Shahi—Right of representative of founder of trust to nominate trustee.*

Where a *Nanak Shahi Sangat* was founded, but no trust was created, and it was not shown that any usage or course of dealing pointed to a different mode of devolution, held, that the right to nominate a trustee remained vested in the founder of the endowment and his heirs,

Religious Endowment.—(Continued).

and it is for the other claimants to show that the former had divested themselves, either at the foundation or afterwards, of the powers which naturally belonged to them. **Shree Prasad v. Aya Ram**, 4 A.L.J. 565=A.W.N. (1907), 210=29 A. 663.

KNOX, A.C.J., and DILLON, J.

(6) *Hindu Law—Debutter, private—Conversion into secular property—Consensus of family—Real or nominal debutter—Test—Dealings with property—Release by Government, effect of—Shebait right, alienation of, to co-shebait—Validity—Idol—breakage of.*

Properties dedicated to a family idol may be converted into secular property by the consensus of the family.

Held—that in this case the properties if originally debutter have been so converted with common consent.

In dealing with a question as to whether properties alleged to be debutter are really debutter or only nominally so, the manner in which the dedicated properties have been held and enjoyed is the most important point for consideration.

Release by Government is not conclusive evidence of property being debutter. (a)

Shebait right cannot be transferred even to a co-shebait or to one who is next in succession. (b)

Quere:—Whether an idol which has been broken is capable of holding property. **Gobinda Kumar Roy Chowdhury v. Debendra Kumar Roy Chowdhury**, 12 C.W.N. 98.

RAMPINI, C.J. and SHARFUDDIN, J.

References :—(a) 21 W.R. 365, F; (b) 4 L.R.I.A. 76, 27 L.R.I.A. 69, 19 A. 428, 22 C. 989, R; 6 B. 298, not F.

(7) *Debt incurred by deceased manager of mutt—Liability of successor to pay off amount from the income of the mutt property—Necessity for creation of a charge by the deceased manager.*

Where a debt was incurred by the defendant's predecessor in office as manager of mutt, for purposes necessary for the maintenance of the institution, a decree limiting the liability of the estate to the income of the mutt may be validly passed, although the debt was not made a charge on the estate by the deceased manager, in the same manner as the estate of an infant may be liable for a contract by the guardian without any express charge over the estate

Religious Endowment.—(Concluded)

having been given. **Nataraja Desikar v. Noor Mahomed Rowthen**, 17 M.L.J. 553.

WHITE, C.J., and MILLER, J.

References:—27 M. 435, 4 I.A.52 (P.C.), 17 M.106, 20 B. 61, R.

- (8) *Son of a Hindu Mahant of a, whether entitled to succeed to the office of his father and the property of the institution.*

This was a suit by the son of a *Mahant* of a *dera* or *dharmasala*, for possession of property, alleging that he was entitled to succeed to the same as the rightful heir of his father, and, in the alternative, that, if the property be treated as the property of the religious endowment, he had a superior right of succession thereto. The main question for decision was whether, if the property be that of the religious endowment, plaintiff was entitled to claim possession on the ground of right (1) as son or (2) as the duly elected *Mahant* of the institution, according to the custom among *Udasi* *fegirs*, to whom the institution belonged. *Held*, among the *Udasis*, the married *Udasis* are called *Bindi* while those who remain celibate are called *Nadi* and among the former, the son succeeds and becomes the *Mahant*. Further, even assuming there was no precedent of a son's succession in the particular *dera*, the old rule should be held to prevail, that the election by the fraternity remove such defect, if it is one, in plaintiff's title. **Dasaundhi Ram v. Khazan Dass**, 112 P.R. 1906 = 102 P.L.R. 1907.

CHATTERJI & KENSINGTON, JJ.

References:—101 P.R. 1905 & 136 P.R. 1889,

(8-a) *Suits of a Civil nature—Cognizability by a Civil Court—Question of ritual, when cognizable by a Civil Court—Position of Dharmakattas—Introduction of new idols into temple—Change of namams in Vaishnava temple—See Civ. Pro. CODE, No. 9, 17 M.L.J. 1.*

(9) *Decree directing performance of puja and giving of honors to a deity according to the usage of a religious institution—Nature and execution of decree—See Civ. Pro. CODE, No. 99, 2 M. L. T. 94.*

Religious Endowments Act.

See ACT XX OF 1863.

Religious institutions

(1) *Suit for removing mahant for misconduct and appointing another—Advocate-General's sanction—See Civ. Pro. CODE, No. 265, 78 P.R. 1907.*

(2) *Succession to occupancy rights belonging to—See ACT XVI OF 1887 (PUNJAB TENANCY), No. 5, 2 P. R. 1907 (Revenue).*

Remand.

(1) *Irregular order of remand made by an Appellate Court—Remedy—See Civ. Pro. CODE, No. 74, 5 C.L.J. 328.*

(2) *Power of Appellate Court to—on grounds other than those specified in S. 562, Civ. Pro. CODE—See Civ. Pro. CODE, No. 76, 1 M.L.T. 268 = 16 M.L.J. 479 = 30 M. 54.*

(3) *Suit decided with reference to some only of several issues framed, after recording all the evidence—Preliminary point, meaning of—See Civ. Pro. CODE, No. 280, 27 P.W.R. 1907.*

(4) *Order of, not a final decree—See Civ. Pro. CODE, No. 286, 52 P.R. 1907.*

(5) *—to lower Court, when to be made—S. 562, Civ. Pro. CODE—See RES JUDICATA, No. 7, 30 M. 203.*

(6) *Appeal against remand, when to be presented—See APPEAL (GENERAL), No. 5, 6 C.L.J. 547.*

(7) *Order of—Appealability to Privy Council—See Civ. Pro. CODE, No. 301, A.W.N. (1907), 291.*

(8) *Addition of parties after—See PARTIES, No. 1, 20 P.L.R. 1907.*

(9) *Reversing decree as to part of disputed property and remanding the suit as to remainder—Piecemeal decision—See PRACTICE, No. 1, 9 Bom. L.R. 966.*

Rent.

(1) *Inamdar—Mirasdar—Enhancement of rent—Burden of proving that the enhancement is fair and equitable.*

Where an Inamdar seeks to impose enhanced rent on a Mirasdar, it lies upon him to prove that the enhanced rent is fair and equitable, and such as, according to the custom of the country, is leviable on land of the description held by the Mirasdar. **Laxuman Junu v. Krishnaji Antaji**, 9 Bom. L.R. 861.

JENKINS, C.J., and ASTON, J.

(2) *—Commutation of bhowli into nakdi rent—See COMMUTATION No. 1; 6 C.L.J. 727.*

Rent.—(Concluded).

(3) *Bhowli* commuted into *Nakdi* rent—Whether landlord or tenant can revert to *bhowli* without other's consent—See **LANDLORD AND TENANT**, No. 20, 6 C.L.J. 369.

(4) Sums payable by stall-keepers if—See **ACT IX OF 1880 (CESS)**, No. 2, 11 C.W.N. 1053.

(5) Rent as used in cl. (c), S. 169 of the Bengal Tenancy Act does not exclude interest—See **ACT VIII OF 1885 (TENANCY)**, No. 34, 11 C.W.N. 1106.

(6) Conversion of *nakdi* into *bhowli* rent before the submission of road cess return—See **ACT IX OF 1880 (ROAD AND PUBLIC WORKS CESS)**, No. 1, 11 C.W.N. 211.

(7) The word—in the Bengal Tenancy Act, whether includes interest—See **ACT VIII OF 1885 (BENGAL TENANCY)**, No. 17, 11 C.W.N. 110=5 C.L.J. 69.

(8) Dispossession of lessee by another lessee—Suspension of rent—See **LANDLORD AND TENANT**, No. 11, 34 C. 191.

(9) Judgment in civil suit for—Merger of cause of action for rent under Rent Recovery Act—See **ACT VIII OF 1865 (MADRAS RENT RECOVERY)**, No. 1, 17 M.L.J. 411.

Rent Act.

See **ACT XXII OF 1886 (ODDH)**.

Rent Recovery Act.

See **ACT X OF 1859** and **ACT VIII OF 1865 (BENGAL)** and **ACT VIII OF 1865 (MADRAS)**.

Representation.

(1) Right of succession by representation among Muhammadan Kashmiris of Bengal—See **CUSTOMS (PUNJAB)**, No. 4, 8 P.R. 1907.

Representative.

(1) Person attaching decree is representative of decree holder—See **LIMITATION ACT**, No. 33, 6 C.L.J. 141.

(2) Right of, to continue proceedings initiated by defendant to set aside *ex parte* decree—See **Civ. Pro. CODE**, No. 71, A.W.N. (1907), 176.

Rescission.

(1)—of contract—Non-completion of contract for ten months—Return of deposit—Presumption of—See **CONTRACT ACT**, No. 22, 4 A.L.J. 778.

Res Judicata.

(1) *Suit against widow for setting aside gift by her—Subsequent suit against her daughters for possession, subject matter of, neither in issue nor heard and decided in previous suit—Civil Procedure Code, S. 13, explanation II.*

Plaintiffs, who were the collaterals and reversioners of one B, deceased, had sued his widow M to set aside a gift of B's estate made by her. Subsequently, the widow having died, the present suit, for possession of the property, was instituted by them against the two daughters of B and certain co-reversioners with them. The daughters pleaded that the plaintiffs had not a superior right to succeed, but their contention was overruled by the lower Courts as barred under S. 13, Civil Procedure Code, explanation II, on the ground that, although the daughters were not parties to the previous litigation, the entire estate was represented by their mother through whom they claimed and they were therefore bound by the prior decision that the plaintiffs were the reversionary heirs. *Held*, because the question as to who had the superior claim was not a necessary issue in the previous declaratory suit and had not been therefore adjudicated upon, the matter could not be held as having been heard and finally decided, within the meaning of S. 13, Civ. Pro. Code, and the daughters were not barred from setting up the above defence, by reason of the decision in the prior suit. **Bhari v. Pir Bakhsh**, 107 P.R. 1906=76 P.L.R. 1907.

KENSINGTON and LAL CHAND, JJ.

References:—24 C. 711 and 28 C. 17, F. 29 P.R. 1895 and 11 C. 196, D.

(2)—in execution proceedings—Maintenance decree—Construction—Limitation Act, Sch. II, Art. 179, cl. (6).

Where a decree directs the defendants to pay maintenance at a certain rate per annum from the date of the plaint, 18th July, 1876, it was held that the proper construction of the decree was that payment should be made on the 18th July, 1877, and every subsequent year on the corresponding date; and so the decree was one which "directed payment to be made on a certain date" within the meaning of cl. (6) of Art. 179 of the Limitation Act (a).

In a petition for the execution of a maintenance decree, an erroneous decision on a point of law does not operate *res judicata*, so as to bar a subsequent application to recover arrears

Res Judicata.—(Continued).

of maintenance accrued due after the first application. **Altamma v. Narayana Bhattar**, 17 M.L.J. 402=80 M. 504.

BENSON and WALLIS, JJ.

References :—(a) 12 B. 65, 14 M. 366, R.

(3) *Application of principle of, to execution proceedings.*

Although the use of the expression "Res Judicata" in the case of execution proceedings is not strictly correct, orders in execution proceedings are governed by principles analogous to those of Res Judicata and are binding, if not appealed against, in subsequent proceedings in the same suit. Their binding force depends, not upon S. 13, Civ. Pro. Code, but upon general principles of law. **Ibrahim Bambala v. Imam Din**, U.B.R. (1907), Civ. Procedure, 1.

SHAW, J.C.

References ;—3 A. 141, 173, 6 A. 269, 8 C. 51, 11 I.A. 181, U.B.R. (1897-01), II, 252, R.

(4) *Suit for redemption decreed—Subsequent suit for recovery of the amount not taken into account—Transfer of Property Act (IV of 1882), Ss. 92 and 94.*

In a suit for redemption there ought to be a complete and final settlement of all accounts between the mortgagor and the mortgagee, right up to the date of the redemption. Where therefore, a mortgagor obtained a decree for redemption, and paid up the amount found due, and subsequently brought a suit for recovery of the amount, which, he alleged, the mortgagee had collected during the time he was in possession, and which was not taken into account in the previous suit, *held* that the suit was barred. **Kashi Pershad v. Bajrang Pershad**, 4 A.L.J. 763=A.W.N. (1907), 281.

RICHARDS, J.

(5) *Execution proceedings—Prior application claiming interest not awarded by decree—Failure to object to claim—Objection in subsequent proceedings—Notice on prior application silent on claim for interest.*

It is open to a judgment-debtor to put forward his objection to a claim for interest not awarded by the decree, when the sale proclamation comes up for settlement, and it cannot be held that, merely because such objection might have been raised and an adjudication had at an earlier execution proceedings, the executing Court must, by its previous order to attach the property, be held to have decided, to accept

Res Judicata.—(Continued).

the claim of the judgment-creditor for interest not given by the decree (a) especially so, when the notice of prior execution did not at all mention the claim for interest, such prior order is, therefore, no bar by *res judicata* to the judgment-debtor subsequently raising the objection to the claim for interest. **Viyathan Sridevi v. Neelakanta Pattar**, 17 M.L.J. 311.

MILLER, and WALLIS, JJ.

Reference :—(a) 15 M.L.J. 7, F.

(6) *Civil Procedure Code, S. 13—Suit of the nature cognizable by a Small Cause Court—Incidental determination of a question of title.*

Held that the incidental determination, in the course of a suit of the nature cognizable by a Court of Small Causes, of a question of title, does not operate as *res judicata* and prevent the same question being litigated afresh in a Court competent to decide it. **Anwar Ali v. Nur-ul-Haq**, A.W.N. (1907), 218=4 A.L.J. 517.

DILLON, J.

References :—A.W.N. (1888), 203. A.W.N. (1886), 44, 2 A. 97, F.

(7) *Former suit to redeem land—Defence of irredeemable Adimayavana tenure—Defence disallowed—Subsequent suit to recover Adimayavana allowance—Adimayavana explained—Presumption of perpetual grant of allowance charged on land—Remand to the lower Court when to be made—S. 562, Civ. Pro. Code.*

Defendant had, in a previous suit, sued plaintiff to redeem certain lands held by plaintiff on Kanom, and the plaintiff, as defendant in that suit, pleaded that he had an irredeemable *Adimayavana* tenure in the lands. His contention was disallowed in second appeal, and a decree for redemption passed in favour of the defendant (the plaintiff in the previous suit). Defendant having redeemed the land, plaintiff brought the present suit to recover *Adimayavana* allowance.

On the question whether the present suit is not *res judicata*, the High Court held that the decision in the previous suit, disallowing the plea of perpetual tenure, would not be a bar to the present suit to recover the (*Adimayavana*) allowance. The word *Adimayavana* implies an allowance given for service. *Adimayavana* as well as *Anubhavam*, when used with reference to tenure of land, will *prima facie* import an irredeemable tenure; but it may be used with

Res Judicata.—(Continued).

reference to a specified money or grain rent charged on land, and, in that case, it will not imply any tenure in favour of the grantee.

But if the amount of the grant is not specified, and if the terms indicate that only a fixed rent is reserved for the grantor, and the rest of produce is given as *Anubhavam* or *Yavana* then it may well be that the Court will treat it as creating an irredeemable tenure, so as to secure to the grantee the benefits intended for him by the grant (a).

The fact that an allowance has been enjoyed for many years and has been received during all that time out of certain lands with the acquiescence of successive owners, will justify the conclusion that there was a valid grant of perpetual allowance charged on such lands.

Where an issue is an integral and vital part of the plaintiff's suit, and not a mere preliminary issue within the meaning of S. 562 of the Civ. Pro. Code, an Appellate Court ought not to remand the suit to the lower Court but should call upon the lower Court to return findings on such other issues in the case as are necessary and decide the case itself. **Mana Vikrama v. Karnayan Gopalan Nair**, 30 M. 203.

BENSON and WALLIS, JJ.

References:—(a) 29 M. 501, *Expl.*, and F; 27 M. 202, R.

- (8) *Purchaser at a sale for arrears of revenue—Not representative in interest of defaulting proprietor—Claim under paramount title.*

An auction-purchaser at a sale for arrears of revenue does not derive his title through the defaulting proprietor; but he claims under a paramount title.

So a decree in a suit against the defaulting proprietor to which neither the auction-purchaser nor his predecessor in title was a party cannot operate as *res judicata* against the purchaser. **Gadadhar Bose v. Radha Charan Poddar**, 34 C. 868.

MACLEAN, C.J., and HOLMWOOD, J.

References:—8 W.R. 222, 12 C. 82, F; 2 W.R. 191, 14 W.R. 283, *Diss.*

- (9) *Public processions—right to take an idol in—decision in former suit against some members of the same community—Prohibition to take out processions—no res judicata.*

Res Judicata.—(Continued).

In 1928 certain members of the V community brought a suit and obtained a decree against the T community, prohibiting them to worship an idol in public and to take it out in procession in the streets of the village. The streets were subsequently vested in the Local Board. Some members of the V community now brought this suit for an injunction prohibiting the T community from worshipping or taking out the idol in procession in the streets. *Held*, the streets being public streets, the T community, as members of the public, had a right to take out their idol in processions. *Held* further, that the suit of 1928 was not a representative suit binding property or designed or framed for the purpose of binding for all time the T community. It was a suit against the wrong doers in their individual capacity and the decision on that suit did not operate as *res judicata* to the decision of that issue in this suit. **Sadagopa Charlar v. A. Rama Rao**, 4 A.L.J. 333 (P.C.)=11 C.W.N. 585=5 C.L.J. 566=17 M.L.J. 240=9 Bom. L.R. 663=2 M.L.T. 204=30 M. 185.

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- (10) *Suit by reversioner impeaching alienation by widow—Compromise by reversioner in good faith—Whether such reversioner's son can subsequently sue to set aside alienation.*

Where a widow alienated certain property, and the whole of the reversioners then having any apparent rights sued and entered into a compromise in *bona fides*, they and their successors in title are clearly bound by their action; such action can only be attacked, by a more remote or subsequent reversioner, on the ground of *mala fides*. The principle that, in respect of ancestral land, succession is a right derived from the common ancestor, who first acquired the land, is not one which interferes with the ordinary application of the principles of *res judicata*, limitation and the like.

It is immaterial whether the compromise did or did not have the effect of improving the widow's estate, as regards the property left to her under the compromise. The reversioner's sons are bound by the compromise, whatever its effect might be. **Devi Dial v. Utam Devi**, 37 P.R. 1907.

ROBERTSON and LAL CHAND, JJ.

References:—15 P.R. 1903, 97 P.R. 1906, *Appr.*

Res Judicata.—(Continued).

- (11) *Civil Procedure Code (Act XIV of 1882), S.13—Reference to arbitration out of Court—Award—Application to file the award—Decree in terms of the award—Suit to set aside the decree.*

A reference to arbitration, without the intervention of the Court, resulted in an award, in accordance with which a decree was passed. A suit was then brought to obtain a declaration that the decree was invalid. The grounds, on which the plaintiff based his claim, were grounds, which had previously been substantially raised and determined in the proceedings taken under S. 255 of the Civil Procedure Code, on the application to file the award:—

Held (1) that the order that the award be filed should be regarded as a decree (a); (2) that the points, on which the plaintiff relied, were matters, which were directly and substantially in issue in a former suit, and so, could not be tried in this suit, under S. 13 of the Civil Procedure Code. **Moganlal Gopaldas v. Lalchand Hirachand**, 9 Bom. L.R. 259.

JENKINS, C.J., and CHANDAVARKAR, J.

References:—(a) 29 C. 167; 33 C. 11 and 29 M. 33, F.

- (12) *S.13, Civ. Pro. Code—Judgment obtained against a dead man cannot operate as res judicata in a subsequent suit.*

If a judgment be improperly obtained, so that it never ought to have been signed there can be no doubt, when set aside, it ought to be treated as never having existed (a).

Where, therefore, a judgment was obtained against a dead man, and subsequently another suit was brought against his representatives, it was *held* that the former judgment must be treated as never having existed, and that it could not operate as *res judicata*.

Where causes of action are different, the principle of *res judicata* does not apply. **Haji Noor Mahomed v. N.C. Macleod**, 9 Bom. L.R. 274.

RUSSELL, J.

Reference:—(a) Q.B. 455, F.

- (13) *Execution proceeding—Order permitting withdrawal of execution upon condition—Condition illegal and not bearing on any issue raised between parties—Subsequent application for execution—Right of decree-holder to disregard condition.*

Res Judicata.—(Continued).

Where a decree-holder, having put up certain properties of the judgment-debtor to sale in execution of his decree, bid Rs. 600 for it, but failed to deposit the earnest money and then applied to withdraw the execution; and the Court, being of opinion that this was a dodge to avoid paying the earnest money, allowed the application, but subject to the condition that the same properties should be put up for sale, first at the next application for execution and the decree-holder must bid Rs. 600 for it;

Held—that the Court had no power to make such an order and it was not binding on the decree-holder so as to preclude him from proceeding to execute the decree against the other properties of the judgment-debtor.

The order did not operate as *res judicata* (a). **Jnanuda Sundari Chowdhurani v. Nokuleswar Roy Chowdhury**, 11 C.W.N. 236.

RAMPINI and WOODROFFE, JJ.

Reference:—(a) L.R. 8.I.A. 123=L.R. 8.C. 51, D.

- (14) *Civ. Pro. Code (Act XIV of 1882), S. 13—Joint Hindu family—Suit by one member for redemption—Second suit by other members.*

The sons in a joint Hindu family governed by the *Mitakshara* become, by birth and in their own right, entitled to the family property. They can enforce this right against their father and do not claim under him within the meaning of S. 13, Civ. Pro. Code. A person is said to claim under another, when he derives his title through that other, by assignment or otherwise (a).

Hence, where, in a previous suit for redemption brought by the father, the sons were not arrayed as parties, a second suit, by the sons, for the redemption of their shares in the property, would not be barred. **Sunder Lal v. Chhitar Mal**, 3 A.L.J. 644=A.W.N. (1906), 242=29 A. 1.

STANLEY, C.J., and KNOX, J.

Reference:—(a) 10 A. 411, R.

- (15) *Personal decree with a decree for sale—Application for personal decree dismissed—Execution of original decree against person.*

Where a combined decree under Ss. 88 and 90 of the Transfer of Property Act has been passed, it is not necessary to apply for a personal decree, after the sale of the hypothecated

Res Judicata.—(Continued).

property. If such an application is made, any order passed on that is without jurisdiction and cannot supersede the decree as originally made and cannot operate as a bar to the decree being executed: **Sadho Singh v. Maharaja Parbhu Narain Singh**, 8 A.L.J. 606 = A.W.N. (1906), 251 = 29 A. 12.

BANERJI and AIKMAN, JJ.

- (16) *Rights of parties, ascertainment of, from pleadings and judgment—Defendants inter se, questions between, when binding and conclusive—Constructive res judicata.*

To determine the question of *res judicata*, it is essential to ascertain what were the rights in dispute between the parties and what were alleged between them, and this must be done, not merely from the decree, but also from the pleadings and judgment (a).

Where an adjudication between defendants is necessary to give the appropriate relief to the plaintiff, there must be an adjudication; and in such a case, the adjudication will be *res judicata* between the defendants, as well as between the plaintiff and the defendants; but, for this, there must be a conflict of interest amongst the defendants, and the judgment must define the real rights and obligations of the defendants *inter se* (b).

Quære: Whether the doctrine of constructive *res judicata* is applicable where the subject matters of the two suits are different? (c) **Gurdeo Singh v. Chandrikah Singh, and Chandrikah Singh v. Rash Bheary Singh**, 5 C.L.J. 611.

MOOKERJEE and HOLMWOOD, JJ.

References:—(a) 1 C.L.J. 337 (349) and 31 C. 95, R. (b) 30 C. 95; 22 A. 386; 25 B. 74; 26 M. 337; 3 Hare 627 R. (c) 1 C.L.J. 337 (353.) R.

- (17) *Erroneous decision of question of law—Re-trial of the same question.*

The erroneous decision, by a competent tribunal, of a question of law directly and substantially in issue between the parties to a suit does not prevent a Court from deciding the same question in a subsequent suit according to law (a).

The Court cannot, of course, allow the correctness of the decree given in the former suit to be questioned in the latter suit, on the ground that the former suit was decided under a mistake of law, nor can it pass a decree, the effect of which would be to set at naught, in whole or in part, the decree in the former suit

Res Judicata.—(Continued).

(b). **Mangalathammal v. Narayanasawmy Aiyar**, 17 M.L.J. 250.

BENSON and WALLIS, JJ.

References:—(a) 5 M. 304. 11 M. 396, 28 M. 517, 22 B. 669, 32 C. 749, R.; (b) 26 M. 104, 29 M. 235, 32 C. 749. R.

- (18) *Decision in suit between judgment-debtor and other members of his family to which judgment-creditor was party is res judicata in subsequent suit between other members of the family and judgment-creditor—Right of junior members of alyasantana family to sue for a declaration that judgment-debtor did not represent the family.*

An *ex parte* decree was obtained against the *yajaman* of an *alyasantana* family. The *yajaman* sued the other members of his family for a declaration that the family property was liable for the payment of the above decree debt. The judgment-creditor was made party to the suit, which, however, was dismissed. The judgment-creditor, thereupon, attached certain immovable property of the family in execution of his *ex parte* decree; but the other members of the family instituted a suit against the judgment-creditor and the judgment-debtor for a declaration that the attached property is not liable to be sold. Held that the decision in the prior suit was *res judicata* in the subsequent suit. The judgment-creditor had a right to appeal against the dismissal of the prior suit (a), and even if he had no right to appeal, that cannot have any effect upon the question of *res judicata*.

It is open to the family to show that the judgment-debtor did not represent the family, when the debt was incurred. **Yusuf Sahib v. Durgi**, 17 M.L.J. 260 = 2 M.L.T. 368 = 30 M. 447.

References:—(a) 7 M. 149, 28 M. 457, 29 M. 515, 9 C.W.N. 584, R.

- (19) *S. 13, Explan. II, Civ. Pro. Code—Former suit based on allegation that plaintiff was owner by purchase—Dismissal of suit—Subsequent suit for possession by him as heir.*

Explan. II to S. 13 merely explains a matter directly and substantially in issue in a suit, but it does not dispense with the necessity of finding, in a particular case, the other equally essential requirements of the section, such as that the parties were litigating under the same title and that the matter in issue was finally

Res Judicata.—(Continued).

heard and decided. So, where the former suit brought by a person was based on an allegation that he was owner of the land then sued for by reason of his purchase, the dismissal of that suit is not *res judicata* in a subsequent suit brought by him for possession of the same land on the ground that he was entitled thereto, not as owner, but as heir to the last male owner. Under such circumstances, the plaintiff could not have included such inconsistent claims in one plaint in the former suit without creating confusion. **Chiragh Din v. Nizam Din**, 55 P.R. 1907.

LAL CHAND, J.

References:—146 P.R. 1890, 26 M. 760, 27 M. 102, 28 C. 17, 24 C. 711, *Ā*; 4 P.R. 1889, 4 P.R. 1903, 39 P.R. 1881, 142 P.R. 1884, 96 P.R. 1881, 146 P.R. 1890, 63 P.R. 1896, 100 P.R. 1898, 19 A. 517, 20 C. 79, 20 A. 81, 20 A. 516, *D*.

(20) *Unnecessary finding*—Pro forma defendants—Court's power to examine former decision—Burden of proof.

A person died leaving sons and daughters. One of the sons sued to enforce an award and to have the deceased's property awarded to himself and his brothers in accordance with it; in the alternative, to partition the property, if the award was not binding on any one, among the brothers, on the ground that the daughters were excluded by custom; but that, if this was not proved, then, to partition the property among all the issues, male and female, of the deceased, according to Mahomedan Law. The daughters were impleaded in that suit, because they were alleged to have consented to the reference. But the lower Courts found that the daughters have been duped into consenting to the reference and were, therefore, not bound by the award. The Courts also held that the daughters were excluded by a custom and, consequently, their consent to the reference being immaterial, gave a decree in accordance with the award in favour of the brothers alone. Subsequently, some of the daughters sued for possession by partition of their shares in their father's property under the Mahomedan Law. The defence pleaded that this suit was *res judicata* under the decree in the prior suit, on the ground that the Courts found that the daughters were excluded by custom. Held that there is no *res judicata*. In the previous suit, all that the Court below had to do was to pass a decree against the male defendants in

Res Judicata.—(Continued).

the terms of the award, on the finding that it bound them, and the decision on the question of status of the daughters with reference to Mahomedan Law or custom was *ultra vires*, inasmuch as that issue did not arise and, therefore, the finding on the issue cannot be pleaded in bar of the present suit.

When the question arises whether an issue was a necessary one, the finding on which is set up as a bar to a fresh trial of the same issue, the Court has power to examine the pleadings and the facts of the former case and the grounds of decision and to see for itself whether the issue was a necessary one, or, in other words, whether the matter pleaded as *res judicata* was directly in issue before. The fact that the Court in the former suit thought the issue to be a necessary one is not conclusive. The party setting up the plea of *res judicata* has to establish and to satisfy the Court trying the later suit that it is substantiated **Rajab-un-nissa v. Habib Bakhsh**, 57 P.R. 1907=66 P.W. R. 1907.

REID, C.J., CHATTERJI and JOHNSTONE, JJ.

References:—157 P. R. 1889 (F.B.), 7 A. 606, 92 P.R. 1895, *R*.

(21) *Act (Local) No. II of 1901 (Agra Tenancy Act), S. 199—Suit for ejectment in Revenue Court—Omission on part of defendant to plead title in himself—*

In a suit for ejectment under Act No. II of 1901, the defendants did not plead their own title to the plot in suit, and, in fact, did not oppose the suit for ejectment. Held that a subsequent suit, brought in a Civil Court by the then defendants, for proprietary possession of the same plot, was barred by the principle of *res judicata*. **Bihari v. Sheetalak**, A.W.N. (1907), 189=4 A.L.J. 545=29 A. 601.

GRIFFIN, J.

References:—A.W.N. (1904), 109 and 141, 27 A. 569, *D*; A.W.N. (1907), 1 and 6, *R*; 29 C. 707, *discussed*.

(22) *Suit to set aside a decree on the ground of fraud—Sole question raised in the suit already decided in proceedings under S. 108 of the Code of Civil Procedure—Res judicata.*

In a suit to set aside a decree, as having been obtained against the plaintiff by fraud, substantially the only ground relied upon was that the suit had been improperly instituted against the plaintiff as of full age, when, in

Res Judicata.—(Continued).

fact, he was a minor. This had been decided against the plaintiff in earlier proceedings between the parties under S. 108 of the Code of Civil Procedure. *Held* that the suit was not maintainable. **Nidar Mal v. Rannak Hussain**, A.W.N. (1907), 191=4 A.L.J. 665=29 A. 608.

BANERJI and AIKMAN, JJ.

References:—29 A. 212, F'; 29 C. 395, D.

(23) *Civ. Pro. Code, S. 13—Res judicata—Award of arbitrators, in excess of jurisdiction—Adoption, proof of.*

A committee of Oudh talukdars made an award on a claim for maintenance, on the ground that an alleged adoption of the applicant had been established, so that he had ceased to have any interest in the heritage of his natural father. The award was subsequently made a decree of Court by the Financial Commissioner.

Held, that the award did not operate as *res judicata*, first, because the Committee was not a Court within the meaning of S. 13, Civ. Pro. Code, and secondly, the Committee had no jurisdiction to decide the question of adoption.

An award made by arbitrators on a point outside their jurisdiction cannot be accorded judicial validity, by reason of affirmation by an officer, who has jurisdiction only to approve awards made with jurisdiction.

When a question is raised as to whether an adoption was ever made, and if made, whether made under necessary authority and with the usual formalities, a presumption will be made in favour of the adoption, only if it is established that there was an initial probability in favour of a valid adoption, and if the conduct of the parties cognisant of the fact has been at least consistent with such practice. **Har Sankar Partab Singh v. Lal Raghuraj Singh**, 6 C.L.J. 13 (P.C.)=11 C.W.N. 841=9 Bom. L.R. 757=17 M.L.J. 354=4 A.L.J. 497=29 A. 519=2 M.L.T. 391.

LORD ROBERTSON, LORD COLLINS and SIR ARTHUR WILSON.

(24) *Negligence of Karnavan in conducting litigation—Subsequent suit whether barred—Necessity for definiteness of finding—Dismissal of suit by tenant—Subsequent suit by landlord.*

If a Karnavan conducts a litigation *bona fide* and without fraud or collusion, his mere negli-

Res Judicata.—(Continued).

gence in the conducting of the suit cannot prevent the result of the litigation being *res judicata* against the other members of the *Tarwad* (a).

A finding must be certain and definite in order to constitute a *res judicata* (b).

In a suit by a tenant for recovery of possession of the property leased both the plaintiff's and the defendant's landlords were made *pro forma* defendants. The suit was decided in favour of the defendant on the sole ground that the defendant was the person who cultivated the property on lease. The question of title to the property was not raised and was not necessary to give the appropriate relief to the plaintiff. *Held* that the former suit by the tenant would not operate as a bar to a subsequent suit by the landlord for a declaration of his title and for recovery of the property. (c) **Govindan parameswaran v. Lakshmi Narayani**, 22 T.L.R. 270.

SADASIVA AIYAR, C.J., & GOVINDA PILLAI, J.

References:—(a) 13 M.L.J. 68, F'; (b) 15 M.L.J. 7, R; (c) 22 T.L.R. 1, 15 M. 111, 7 B. 466, 17 M. 168, 17 M. 273, 24 M. 444, 27 M. 63=13 M.L.J. 23, 14 M.L.J. 281, 11 M. 204, 14 M. 324, 15 M. 264, 12 C. 580, 11 B. 216, 18 B. 520, 31 C. 95, R.

(24-a) Reference to Civil Court of question of apportionment of compensation money—Decision, if *res judicata* on question of title to other properties—See ACT I OF 1894 (LAND ACQUISITION), No. 1, 11 C.W.N. 525.

(25) Erroneous opinion on a point of law how far conclusive.—See CIV. PRO. CODE, No. 15, 8 Bom. L.R. 932=31 B. 128.

(26) Judgment not operating as—Value of judgment as evidence—See CIV. PRO. CODE, No. 29, 11 C.W.N. 380.

(27) Decree for ejectment against tenant for converting agricultural holding into one of a different nature—Effect of decree on tenant's minor son not party to suit against tenant—Suit by son claiming tenancy—See LANDLORD AND TENANT, No. 14, 2 M.L.T. 86.

(28) Finding not embodied in decree may operate as—See HINDU LAW (WIDOW), No. 2, 3 N.L.R. 35.

(29) Determination by Revenue Court of question of proprietary title—Suit in a Civil Court—See ACT II OF 1901 (N. W. P. TENANCY), No. 15, A.W.N. (1907), 1.

Res Judicata.—(Continued).

(30) Whether decision in a previous rent-suit operates as—in a suit for rent for subsequent years—See ACT VIII OF 1885 (BENGAL TENANCY), No. 13, 5 C.L.J. 92.

(31) Constructive—Defence which might and ought to have been taken in former trial—Principle of the rule—Civ. Pro. Code, S. 13, Explanations 2 and 3—See MORTGAGE (REDEMPTION), No. 1, 5 C.L.J. 192.

(32)—between co-defendants—Appellate Court declining to decide an issue and disposing of the case on other grounds—First Court's judgment upon that issue no bar to future suit—See MORTGAGE (GENERAL), No. 19, 5 C.L.J. 653.

(33) Compromise decree when operates as—See COMPROMISE DECREE No. 3, 5 C.L.J. 611.

(34) Deceased widow inheriting a part and buying another part from another heir who subsequently obtained a decree against the estate of the deceased—Right to execute the decree against the part so purchased—See EXECUTION OF DECREE, No. 6, 4 A.L.J. 400.

(35) Prior suit on pattah—Inclusion of voluntary fees in pattah—Failure to object to such inclusion—Subsequent suit—Res judicata—See ACT VIII OF 1865 (RENT RECOVERY), No. 3, 17 M.L.J. 433.

(36) Earlier suit in a subordinate Court—Subsequent suit in a superior Court, but triable by a subordinate Court—Res judicata—See CIV. PRO. CODE, No. 18, 11 P.R. 1907.

(37) Collector's decision under S. 13 of Madras Act III of 1895—Subsequent civil suit barred—See ACT III OF 1895 (HEREDITARY VILLAGE OFFICES), No. 1, 30 M. 320.

(38) See CIV. PRO. CODE, No. 27, 10 O.C. 145.

(39) Temporary revenue settlement—Settlement affirmed by special Judge—See ACT VIII OF 1885 (BENGAL TENANCY), No. 16, 11 C.W.N. 939.

(40) Two appeals from one decree—Decrees in appeal drawn up in identical terms, effect of—See PRINCIPAL AND AGENT, No. 2, 4 A.L.J. 587.

(41) When a judgment may *bare judicata* among defendants—See CIV. PRO. CODE, No. 19, U.B.R. (1907), Civil Procedure, 5.

(42) Tenancy denied in previous suit for rent between landlord and tenant—Suit for rent dismissed—Plaintiff seeking to recover possession cannot sue defendant as tenant—Plea of res judicata—Only course is in ejectment—See LANDLORD AND TENANT, No. 25, 34 C. 922.

Res Judicata.—(Concluded).

(43) Successive rent suits—Question of area on which rent assessable—See Limitation Act No. 121, 11 C.W.N. 1100.

(44) Decision of a Court of Revenue as to propriety of patta or landlord's title, when *res judicata*—See ACT VIII OF 1865 (MADRAS RENT RECOVERY), No. 8, 17 M.L.J. 518.

(45) Decision of Settlement officer that land was not held rent-free, effect of—See ACT VIII OF 1885 (BENGAL TENANCY), No. 2, 11 C.W.N. 859.

(46) Adjudication by Forest Settlement Officer under Madras Forest Act of 1882—Subsequent civil suit barred—See ACT I OF 1894 (LAND ACQUISITION), No. 9-f, 17 M.L.J. 557.

(47) Consent decree—Defendant's right to plead his own fraud in a subsequent suit—See CIV. PRO. CODE (TRAVANCORE), No. 1-a, 22 T.L.R. 255.

Respondent.

(1)—getting a decree against a co-respondent—See CIV. PRO. CODE, No. 274, 4 A.L.J. 772.

Restitution of conjugal rights.

(1) Excommunication from caste—Right to claim re-admission into caste before compelling restitution—Mussalum Kharwas of Broach—See MAHOMEDAN LAW (MORTGAGE), No. 1, 9 Bom. L.R. 491.

(2) Suit for—Valuation of suit—Appeal—Jurisdiction—See ACT XII OF 1887 (BENGAL AND N.W.P. CIVIL COURTS), No. 2, 11 C.W.N. 458.

(3) Decree for, subject to payment of dower—Dower not paid but demanded—See MAHOMEDAN LAW (DOWER), No. 2, 10 O.C. 11.

(4) See HINDU LAW (MARRIAGE AND RESTITUTION ETC.).

Restraint on alienation.

(1) *Validity of condition as to—Void and inoperative condition—Sale in execution of decree of such interest.*

Held that, where a decree of a Settlement Court was based on a compromise which contained restrictions as to alienation, such conditions were void and inoperative (a).

Held further that, where such a decree stood in favour of the judgment-debtor, his right was transferable and could be attached and sold in execution of decree against him. Gaya Din Singh v. Syed Mumtaz Husain, 10 O.C. 186.

SCOTT and EVANS, J. C.

Reference:—1 O.C. 163, F.

Restraint upon anticipation.

(1) Decree passed against separate property of married woman—Attachment—Income of property subject to restraint—See ACT III of 1874 (MARRIED WOMEN'S PROPERTY), No. 1, 17 M.L.J. 363.

Revenue Court.

(1) Decision of a, on a question of title, has the same effect as the decision of a Civil Court as regards appeal—See ACT II of 1901 (N.W.P. TENANCY), No. 18, 4 A.L.J. 53.

Revenue Recovery Act (Madras).

See ACT II OF 1864 (MADRAS).

and ACT VII OF 1868 (BENGAL).

Revenue Sale.

(1) Setting aside sale—Misjoinder—See ACT XI OF 1859 (REVENUE SALE), No. 4, 6 C.L.J. 163.

Revenue Sale Law.

See ACT XI OF 1859 (BENGAL).

Review.

(1) Order of a District Judge under S. 7 of the Guardians and Wards Act, whether open to—See ACT VIII OF 1890 (GUARDIAN AND WARDS), No. 2, 143 P.R. 1906 = 12 P.W.R. 1907.

(2) Application for, on the ground of discovery of new evidence—Rejection by Court—Application for admission of some evidence in appeal—Jurisdiction of Appellate Court—See CIV. PRO. CODE, No. 289, 11 C.W.N. 721.

(3) Setting aside order granting of—Second appeal—See CIV. PRO. CODE, No. 309, 6 C.L.J. 225.

(4) Condition precedent to granting—See ACT IX OF 1887 (PROVINCIAL S. C. COURTS), No. 2, 9 Bom. L.R. 883.

(5) Discovery of favourable decision of superior Court whether good ground for a—See CIV. PRO. CODE, No. 307-a, 124 P.R. 1906 = 97 P.L.R. 1907.

Revision.

(1)—on the ground of exclusion of relevant question—Party must state form and substance of the question proposed to be put.

A party asking for redress at the hands of an appellate or revisional Court on the ground that the Court below has wrongly excluded a question which the party wished to put to a witness, must state the form and substance of the question proposed to be put, to enable the appellate or revisional Court, as the case may be, to determine whether the particular ques-

Revision.—(Continued).

tion in each case was so framed as to make it admissible under the Evidence Act, 1872. **Emperor v. Narayan Shivram Barve**, 9 Bom. L.R. 1885.

CHANDAVARKAR and KNIGHT, JJ.

(2) Chief Court's power to interfere on questions other than that in respect of which application for revision was admitted.

Under cl. 3 of the proviso to S. 70 (1) (b) of the Punjab Courts Act, 1884, the Chief Court cannot exercise its powers of revision, except in regard to those questions, in respect of which the application for revision was admitted under S. 70 (1) (b) of the Act. **Sobha Singh v. Kishore Chand**, 65 P.R. 1907.

ROBERTSON and SHAH DIN, JJ.

(3) Copies of judgment, order or decree sought to be revised, not necessary to be filed.

Held, that no copy of order or judgment sought to be revised is by law rendered necessary as an annexure to the petition of revision. **Mehar Singh v. Gurbachan**, 74 P.W.R. 1907.

JOHNSTONE, J.

Reference :—72 P.W.R. 1907, Appr. and R.

(4) Erroneous finding as to bar by limitation when precludes—See ACT XVIII OF 1884 (PUNJAB COURTS), No. 7, 118 P.R. 1906.

(5) Non-compliance with the provisions of Act XIX of 1841—High Court's power of—See HINDU LAW (JOINT FAMILY), No. 1, 34 C. 929.

(6) High Court's power of revision where aggrieved party has other remedy available, (e.g.) by regular suit—See ACT VII of 1876 (LAND REGISTRATION), No. 1, 12 C.W.N. 16.

(7) Power of High Court in a small cause suit to exonerate defendant, against whom a decree has been passed, and pass a fresh decree against another—See CIV. PRO. CODE, No. 279, 17 M.L.J. 62.

(8) Dismissal of appeal rightly though on wrong grounds—High Court's power of revision—See CIV. PRO. CODE, No. 14, 16 M.L.J. 526 = 2 M.L.T. 40.

(9) Appeal triable by High Court decided by lower Court—Powers of revision of the Chief Court of the Punjab—See ACT XVIII OF 1884 (PUNJAB), No. 5, 16 P.L.R. 1907.

(10) Court has no jurisdiction to allow guardian to spend ward's property after termination of guardianship—No appeal against such order

Revision.—(Concluded).

—Appeal converted into revision petition—See **GUARDIAN AND MINOR**, No. 5, 17 M.L.J. 199.

(11) 'High Court's power to interfere in, with order of restoration—See **CIV. PRO. CODE**, No. 65, 17 M.L.J. 225.

Revocation.

(1)—of submission to arbitration—good cause—collusion of arbitrator—See **ARBITRATION**, No. 1, 3 A.L.J. 613 = A.W.N. (1906), 253 = 29 A. 13.

Right of suit.

(1) *Judgment creditor's right after attachment to protect judgment-debtor's property from wrong-doers*—S. 91, **Transfer of Property Act**.

A judgment-creditor has, after attachment, no greater interest to protect his judgment debtor's property from wrong-doers than he had before the attachment nor has he a right of suit against the wrong-doers (a). The Court, however, can interfere without a suit and the creditor's remedy is to move the Court executing the decree to do so. The right given by S. 91 (f), **Transfer of Property Act**, is not one given to attaching judgment-creditors by the **Civ. Pro. Code**, the law which regulates their rights (b). **Karuppan Chetti (dead) Sankara-Lingam Reddy v. Kandasami Thewan**, 17 M. L. J. 84 = 30 M. 207 (on appeal 30 M. 413).

MILLER, J.

References :—(a) 27 A. 378, R. ; (b) 6 C. 663, compared.

(2) *Malice—Notice—Defendant refusing to receive nomination papers—Election*.

To support an action for damages against a person, appointed to receive the nomination papers of candidates for councillorship on a Municipality, for refusing to receive a nomination paper, it is necessary to allege and prove malice. **Chunilal Maneklal Gandhi v. Kirpa-shankar Bhagwanji Vyasa**, 8 Bom. L.R. 898 = 31 B. 37.

JENKINS, C.J. and BEAMAN, J.

(3) *Natural water course—Obstruction—Dam in the bed of a stream—Damage—Right to sue*.

If a man erects in the bed of a stream a dam, which has the effect of diverting the water from its natural water course on to the land of the plaintiff and damage is thereby done, the plaintiff *prima facie* has a good right of action.

Right of suit.—(Continued).

Madhav Shivram v. Rakhama Bhaushet, 9 Bom. L.R. 864.

JENKINS, C.J., and BATTY, J.

Reference :—6 Bom. L.R. 529, R.

(4) *Archaka kept out of office by co-archaka—Loss of voluntary contribution—Suit for damages*.

A claim by an *archaka* of a temple against his co-archaka to recover what might have been received as voluntary contribution, if he had not been kept out of office, is maintainable. **Bhima Charyulu v. Ramanuja Charyulu**, 17 M.L.J. 498.

WHITE, C. J. and MILLER, J.

References :—27 C. 30 F.; 26 C. 653, Diss.

(5) *Exclusive right to act as khatib—Suit for declaration and injunction, when maintainable*.

A suit by a person for a declaration of his exclusive right to act as Khatib in a certain locality and for an injunction restraining others from acting as such is not maintainable without allegation of disturbance of the plaintiff in the exercise of his office. **Mira Mohidin v. Asan Mohidin**, 17 M.L.J. 421.

BENSON and WALLIS, JJ.

References :—15 M. 355, 19 M. 62, 2 M.L.J. 83, R.

(6) *Suit for money lent independent of pro-note—Liability of other partners on a pro-note signed by one of the partners—See PROMISSORY NOTE*, No. 3, 17 M.L.J. 126.

(7) *Sale to stranger with concurrence of co-sharer—Purchase by such co-sharer—Maintainability of suit for pre-emption—See PRE-EMPTION*, No. 8, 3 A.L.J. 794.

(8) *Prior and subsequent mortgagees—Purchase by each at sale on his mortgage—Right inter se—Suit for possession by prior mortgagee, maintainability of—See MORTGAGE (GENERAL)*, No. 16, 11 C.W.N. 403.

(9) *Suit to set aside ex parte decree on the ground of fraud, such fraud being non-service of summons, maintainability of—See CIVIL PROCEDURE CODE*, No. 70, 4 A.L.J. 51.

(10) *Decision of Revenue Court on a question of title, adverse to plaintiff—Suit by plaintiff in a Civil Court for declaration of title—See ACT II OF 1901 (N.W.P. TENANCY)*, No. 18, 4 A. L.J. 53.

Right of suit.—(Concluded).

(11) Suit to set aside compromise entered into by pleader engaged by the guardian of the minors against the express wishes of the guardian—See *Minors*, No. 2, 34 C. 83.

(12) Person injured by a felonious act—Right of civil suit without bringing or endeavouring to bring the felon to justice—See *ACT V OF 1884 (LOCAL BOARDS, MADRAS)*, No. 1, 17 M.L.J. 537.

(13) Dedication to charity—Dedicator can maintain action for trespass on property dedicated—See *CHARITY*, No. 1, 9 Bom. L.R. 1301.

(14) Suit by one person for breach by another of a duty which that other owed to a third person—See *HINDU LAW (REVERSIONER)*, No. 2, 9 Bom. L.R. 710.

(15) Mortgage by disqualified proprietor—Suit brought after cessation of disqualification—not maintainable—See *ACT XVI OF 1882 (JHANSI ENCUMBERED ESTATES, N.W.P.)*, No. 1, 4 A.L.J. 696.

Road and Public Works Cess Act.

See *ACT IX OF 1880 (BENGAL)*.

Romo-Syrians.

Child inheriting mother's Stridhanam—Father preferential heir to maternal grandfather—See *INHERITANCE*, No. 1, 22 T.L.R. 205.

Sale.

(1) *Unregistered sale deed—Distinction between evidentiary admissions and admissions by the pleadings—Transfer of Property Act, S. 55 (2)—Caveat emptor—Restoration of purchase money on sale being void—Contract Act, Ss. 20 and 65.*

There is a distinction between evidentiary admissions and admissions by the pleadings. S. 58, Evidence Act, governs admissions by the pleadings. Although a sale deed is inadmissible in evidence as being unregistered, an admission by the (vendor) defendant, in his preliminary examination, of an agreement alleged in the plaint, to the effect that he would make good any loss the (plaintiff) purchaser might incur in respect of the property sold, is not excluded by S. 91, Evidence Act, and renders proof of the agreement unnecessary.

Plaintiffs sued to recover a certain sum, alleging that he bought for that sum a piece of land as a house site from the defendants, they agreeing to make good any loss he might incur

Sale.—(Continued).

in respect of the transaction, and that the Collector thereafter declared the land to be State and refused permission to him to build on it. *Held* that, in the face of such an agreement, the rule of *caveat emptor* cannot be applied. Apart from the agreement, it is doubtful whether the maxim itself is current in India and retains validity in respect of the vendor's title. Moreover, the principle of S. 55 (2) of the Transfer of Property Act, under which the seller passes a covenant for title, ought to be followed as a matter of justice, equity and good conscience, although the Transfer of Property Act itself is not in force in Upper Burma. Again, both the parties believed at the time of the sale that the land was *bobabain* and they had no knowledge or warning that it would be subsequently declared to be State. This is, therefore, such a mistake as is referred to in S. 20 of the Contract Act, and S. 65 of that Act requires the sellers (defendants) to restore or make compensation for the advantage they receive, apart from any agreement which they admitted to have made. *Sadhu v. Nga Si Gyl*, U.B.R. (1907), Evidence, 1.

SHAW, J.C.

Reference.—U.B.R. (1897-01), II, 379, F.

(2) *S. 54, Transfer of Property Act, not extended to Berar—Transfer of intangible, unmoveable property—Sale of equity of redemption—Registration of deed of transfer—Admission of transaction effected by unregistered instrument, effect of—Estoppel—Ss. 17 & 49, Registration Act—S. 24, Stamp Act.*

The equity of redemption of a usufructuary mortgage is an intangible thing within the meaning of S. 54, Transfer of Property Act (a). The effect of S. 54 of the Transfer of Property Act is to abrogate the rule of Hindu Law which recognised transfer by *parol*. But S. 54 has not yet been extended to Berar and the rule that a transfer of intangible, unmoveable property of whatever value must be by registered deed cannot be enforced in Berar (b). So the parties to a sale in Berar are not bound by law to reduce the terms of the transaction to the form of a document; but if they did reduce them to the form of a document, and the consideration for the sale exceeded Rs. 100, that document requires to be registered under S. 17 of the Registration Act, in the absence of which, the document cannot, with reference to S. 49, Registration Act, confer a valid title. And a

Sale.—(Continued).

transaction, which is effected by an unregistered instrument, does not become valid in law, because it is admitted and has been acted upon (c).

Where the consideration for the sale of the equity of redemption is expressly set forth as being the amount of the mortgage, that amount must be taken as the consideration for deciding whether the deed requires to be registered (d).

S. 24, Stamp Act, has no connection with the question of liability to registration (e).

A representation made to a person, who knows the facts, does not amount to an estoppel (f), and an admission on a point of law is not an admission, so as to make the admission matter of estoppel (g). **Jairam v. Balkrishna Das**, 3 N.L.R. 72.

BATTEN, J.C.

References:—(a) 24 M. 449, R; (b) 26 C. 1, 26 C. 39, *Expld.* (c) 12 C.L.R. 154, 25 W.R. 211, 22 M. 508, 3 Berar L.J. 19, R; 18 B. 66, D; (d) 15 W.R. 558, 11 B.H.C.A.C. 149, 16 P. R. 1892, R; (e) Bom. Printed Judgts. 1892, P. 259, D; (f) 30 C. 539 (P.C.), R; (g) 21 A. 285, R.

(3)—*by registered deed to one person—Prior verbal sale to another person—Notice—S. 48, Registration Act—S. 27 (b), Specific Relief Act.*

Where a person sold his land to another verbally, before he sold it to a third person by registered deed, and the subsequent purchaser had actual notice of the prior sale, held that the equitable doctrine of notice applied, notwithstanding the provisions of S. 48, Registration Act (a).

The prior purchaser is entitled, under S. 27 (b), Specific Relief Act, to a decree for specific performance of the sale to him, as against both his vendor and the subsequent purchaser, who had notice of the prior sale. **Tun Zan v. Maung Nyun**, 4 L.B.R. 26.

FOX, C.J.

References:—(a) 4 B. 126, 10 C. 250, 10 C. 710, R.

(4) *Deed of sale, acted on—Absence of consideration—Intention of transferee that the deed should not be operative until the happening of a certain event—Effect of the deed.*

A Hindu widow transferred by a deed of sale certain lands in favour of her nephew, and the nephew was informed of the deed. The transfer

Sale.—(Continued)

was also acted upon, in that the tenant in possession executed an agreement to the nephew. But the deed was always retained by the transferor. After the death of the nephew, his mother, being his legal heir, transferred the lands to the defendant. In a suit by the widow against the defendant for the recovery of the possession of the lands, it was found that no consideration passed from the nephew to the plaintiff, and that the widow intended the deed to become operative only on the event of her nephew outliving her. Held that the deed operated to convey to the nephew the title which it purported to convey, and that the plaintiff cannot be heard to say that she intended that title should not pass if the nephew pre-deceased her. If the parties intended title to pass, the fact that no consideration was paid does not prevent title from passing (a). **Amirthamma v. Ponusami Pillai**, 17 M.L.J. 386.

WHITE, C. J., MILLER, J.

References:—(a) 16 M.L.J. 147, F.; 20 M. 326, D; 28 M. 124, 21 M. 90, 37 Eng. R. 744 (749), R.

(5) *Meaning of—See LIMITATION ACT, No. 46, 17 M.L.J. 220.*

(6)—*of immoveable property valued less than Rs. 100, essentials of—See TRANSFER OF PROPERTY ACT, No. 24, 34 C. 207.*

(7) *Valuable property sold for nominal price—Application of principle ut res magis valeat quam pereat—See ACT I OF 1895 (PUBLIC DEMANDS RECOVERY), No. 6, 5 C.L.J. 687.*

Sale proclamation.

(1) *Purchaser at execution sale for full value, liability of—Entries in proclamation of sale, how far binding on purchaser—See EXECUTION SALE, No. 4, 10 O.C. 252.*

(2) *place for sale fixed in—Conducting the sale elsewhere whether a material irregularity—See CIV. PRO. CODE, No. 164, 132 P.R. 1906=11 P.L.R. 1907.*

Sanction to prosecute.

(1) *Meaning of “Court” used in S. 195 (1) (b), Criminal Procedure Code.*

The term “Court” as used in S. 195, cl. 1 (1), (b) of the Code, is not confined to the Judge, who tried the case or the appeal, as the case may be, but also means and includes the successor in office of such Judge; a sanction for prosecution, granted under this section by such successor, is valid in law and is not

Sanction to prosecute.—(Continued).

defective for want of jurisdiction. In the matter of **Lalit Mohan Pal**, 5 C.L.J. 176.

MACLEAN, C.J., MOOKERJEE and HOLMWOOD, JJ.

References :—38 C. 193, *F*; 9 C.W.N. 850 *R*.

- (3) *Defective, illegal—Court granting sanction, duty of—High Court, power of interference with order of subordinate Courts granting sanction—Crim. Pro. Code, S. 195, Sub-ss. 4 and 6.*

Under S. 195, Sub-s. 6 of the Crim. Pro. Code, the High Court has the power to interfere with the order of a District Judge, affirming the sanction granted by a Munsiff, and not revoking it (a).

In granting sanction for the criminal prosecution of any person, the Judge, who grants such sanction, should comply strictly with the terms of the law. Where the sanction does not specify the place where, and the occasion on which, the offences were said to have been committed, as required by law, the sanction is defective and ought to be revoked, even if the facts may be gathered by implication. **Girija Sankar Roy v. Binode Sheikb**, 5 C.L.J. 222 = 5 Cr. L.J. 188.

RAMPINI and MOOKERJEE, JJ.

Reference :—(a) 10 C.W.N. 1026, *D*.

- (3) *Perjury—False charge, Making of—Sanction to prosecute refused by trying Magistrate—Duty of superior Court.*

Sanction to prosecute should only be given in a case in which, in the interests of justice, further criminal proceedings are necessary. The view of the Court, which originally passed the order, on which the proceedings for sanction are taken is most valuable and should not be lightly set aside. **Hira v. Gopi**, 17 P.L.R. 1907.

CHATTERJI, J.

- (4) *Appealability of order of single Judge of High Court interfering or declining to interfere in revision—Application for sanction to prosecute—Appeal—Appellate Court jurisdiction to direct lower Court to take fresh evidence—Crim. Pro. Code, S. 195,--Revisability of proceedings under S. 195, Crim. Pro. Code, before Judges of Civil Courts—Civ. Pro. Code, Ss. 624, 647, 568 and 569.*

An appeal lies against the decision of a single Judge of the High Court, whenever it amounts to a judgment; and an order of a single Judge interfering in revision is an appellate judgment (a).

Sanction to prosecute.—(Continued).

The rejection by such a Judge of a revision-petition, on the ground that the objection therein taken to the jurisdiction of the lower appellate Court to pass a certain order was unfounded, is also a judgment and is appealable (b).

When an application for sanction to prosecute comes before the District Judge on appeal from the District Munsiff under S. 195, Crim. Pro. Code, the District Judge has no jurisdiction to direct the Munsiff to take fresh evidence. The powers conferred by S. 195, Crim. Pro. Code, are of a very special nature and no inherent jurisdiction can be attributed to any Court, in the exercise of such powers, unless it is incident to their proper exercise (c) and the jurisdiction to direct a District Munsiff to take fresh evidence is not necessarily incident to the exercise of the appellate jurisdiction conferred by S. 195, Crim. Pro. Code.

The effect of S. 647, Civ. Pro. Code, is not to make the provisions of the Civ. Pro. Code applicable to proceedings under S. 195, Crim. Pro. Code, which are of a criminal, rather than a civil nature (d). **Rama Iyer v. Venkatachala Padayachi**, 2 M.L.T. 84 = 17 M.L.J. 123 = 5 Cr. L.J. 288 = 30 M. 811.

WHITE, C.J. and WALLIS, J.

References :—(a) 22 M. 68, *ll*. (b) L.P. Appeals No. 16 of 1905 and No. 64 of 1906, *F*; 23 M. 169, 27 M. 340, not *F*. (c) L.P. Appeals Nos. 13 and 14 of 1904 and No. 27 of 1906, *F*. (d) 26 M. 139, 28 A. 554, *R*.

- (5) *Appeals from orders granting, confirming, refusing or revoking sanction—Crim. Pro. Code, S. 195, cls. 6 and 7.*

The right of appeal conferred by S. 195 (6) Crim. Pro. Code, as read with sub-section 7 of the same section, is not restricted to a right of appeal to the appellate Court, to which the Court of first instance is immediately subordinate. An appeal lies to the High Court, not only in cases where the Court of first instance refuses sanction, and sanction is granted by the Court to which that Court is immediately subordinate, but also in cases where the Court of first instance grants sanction and the sanction is revoked by the Court to which that Court is immediately subordinate (a). A revocation of a sanction is a refusal of the sanction, in the same way as an order confirming a grant of a sanction is a giving of the sanction, for the purposes of the section (b). **Muthusami**.

Sanction to prosecute.—(Continued).

Mudali v. Yeeri Chetty, 17 M.L.J. 266 (F.B.) = 2 M.L.T. 239.

WHITE, C.J., SUBRAHMANIA AIYAR and MILLER, JJ.

* *References*:—(a) 27 M. 223, *Appr*; (b) 5 C.L.J. 219, 222, 10 C.W.N. 1026, R.

(6) S. 195 (4) & (6), *Crim. Pro. Code*—*Sanction to prosecute—Requisites of a valid sanction—Question of guilt to be gone into.*

*Where sanction to prosecute a person given under S. 195 of the Code was couched in such general terms that it was impossible to say exactly what offences were imputed to him and in connection with what deeds he was charged with having committed them :

Held,—that the sanction was illegal and ought to be set aside.

Sanction to institute criminal proceedings should be in express terms and should strictly comply with the provisions of the law. It is not a sufficient compliance with the law, if the necessary elements have to be gathered from the Court's judgment by implication.

No sanction should be granted unless the Court has made up its mind that the accused has committed the offences for which he is to be prosecuted. That question ought not to be left over for consideration at the trial. **Habibur Rahman v. Munshi Khodabux**, 11 C.W.N. 195 = 5 C.L.J. 219 = 5 Cr. L.J. 29.

RAMPINI and MOOKERJEE, JJ.

(7) *Crim Pro. Code (Act V of 1898), S. 195—Sanction to party to suit pending appeal to higher Court—Conviction doubtful—Stay of proceeding for sanction pending appeal—Proper procedure.*

In a suit for pre-emption, a sale-deed was produced on behalf of the defendants to show that part of the consideration consisted of certain promissory notes executed by the vendor. The promissory notes were found by the Subordinate Judge to be forgeries put forward with the object of increasing the pre-emption price, and the plaintiff's suit was decreed; and on the application of the plaintiff, the Subordinate Judge granted sanction to prosecute the defendants and certain witnesses examined on their behalf. On appeal, the District Judge declined to revoke the sanction, although he was of opinion that the evidence, on which the Subordinate Judge relied as likely to secure a conviction, was unsatisfactory. On an application for stay of proceedings for sanction, pending an appeal preferred by the defendants in the High Court,

Sanction to prosecute.—(Continued).

against the decree of the Subordinate Judge, *held* that it was neither necessary nor desirable in this case, to grant sanction to one of the parties to pursue a doubtful criminal prosecution, pending the decision of the appeal which had been ordered to be expedited, and the hearing of which was probably being delayed by these proceedings.

The proper procedure in a case of this kind is to await the conclusion of the litigation, and then to move the higher Court to take action, if necessary, in the ends of public justice. **Jadu Lal Sahu v. J.R. Lewis**, 11 C.W.N. 712.

MOOKERJEE and HOLMWOOD, JJ.

* *References*:—16 B. 729, 18 B. 581, 26 M. 190, B.L.R. Sup. Vol. 426, 14 Q.B. 396, R.

(8) S. 195 (b) and (c), *Crim. Pro. Code—Suit in Court of Small Causes—Reference to arbitrator—Fabrication of evidence and forgery and using forged document before such arbitrator—Prosecution—Sanction of Court.*

*In a suit in the Court of Small Causes, the Court made a reference under the rules of the Court to an arbitrator. The accused, a party to the suit, was alleged to have fabricated evidence and to have committed forgery and to have used a forged document which was produced before the arbitrator. The accused was prosecuted in respect of those offences, without the sanction of the Court of Small Causes. *Held*, that a Magistrate could not take cognisance of the prosecution, without the sanction of the Court of Small Causes where the document alleged to be forged was filed with the award and formed part of the record of the suit. **Puttiah v. Veerasawmy**, 17 M.L.J. 420.

BENSON and WALLIS, JJ.

(9) S. 195 (*Crim. Pro. Code*).—*Sanction to prosecute, when to be granted.*

Sanction to prosecute is not usually granted unless there is a very reasonable chance of a conviction following.

A sanction to prosecute under S. 195 of the Code of Criminal Procedure ought to be granted with great circumspection and care. If granted it places in the hands of the person obtaining it a very powerful weapon which the unscrupulous might use for purposes of oppression or blackmail. **Kali Charan Lal v. Basudeo Narain**, 12 C. W.N. 3.

MACLEAN, C.J. and HOLMWOOD, J.

Sanction to prosecute.—(Concluded).

(10) Perjury in a possessory suit—Sanction not given by mamlatdar—Appeal to District Judge—Collector has no jurisdiction to hear appeal—See ACT II OF 1906 (MAMLATDAR'S COURTS, BOMBAY), No. 4, 9 Bom. L.R. 896.

Santal Perganas.

(1) See ACT VIII OF 1890 (GUARDIAN and WARDS), No. 1, 34 C. 569.

Sea Customs Act.

See ACT VIII OF 1878.

Search.

(1) Recovery of articles seized by Police during, suit for—See CIV. PRO. CODE, No. 226, A.W.N. (1907), 170.

Security.

(1)—for filing application by judgment-debtor to be declared insolvent—See CIV. PRO. CODE, No. 198, A.W.N. (1907), 120.

Security for Costs.

Appeal in *forma pauperis*—Security for costs—Jurisdiction—Delay in making the application—See CIV. PRO. CODE, No. 274-a, 17 M.L. J. 593.

Select Committee.

(1) Reference to reports of, to ascertain object of enactments—See ACT XI OF 1898 (CENTRAL PROVINCES TENANCY), No. 2, 3 N.L.R. 40.

Service.

Land allotted for performing—Holding land after discontinuing—Denial of title, effect of—See LANDLORD and TENANT, No. 19, 4 A.L.J. 556.

Service Tenure.

(1) Under-tenants, if can acquire occupancy—Ejectment—Notice to quit.

When land was granted to a person as a service-tenure, the condition being that he was to hold it in lieu of services to be performed by him as Chowkidar; held, that tenants under him did not acquire occupancy right by holding the land for more than 12 years.

Held, further, that, on the death of the grantee, the grantor was entitled to sue the under-tenants in ejectment without previously serving them with notices to quit. **Mritunjoy Roy Chowdhry v. Kénathullah Narya**, 11 C.W.N. 46=5 C.L.J. 53.

GHOSE, C.J., and CASPERSZ, J.

Reference:—2 C.L.J. 403, R.

Set off.

(1) Assignment of lessor's right—Suit by assignee against lessee for rent—Prior mortgage of leased property to lessee—Mortgagee's (lessee) right to set off mortgage amount against lease amount—See TRANSFER OF PROPERTY ACT, No. 10, 17 M. L. J. 87.

(2) Right of, in a suit by receiver—See CIV. PRO. CODE, No. 80, 17 M.L.J. 481.

(3) Claim to, in a suit for contribution—See CONTRIBUTION, No. 3, 12 C.W.N. 60.

(4) Suit against tenant who happens to be lambardar—Defendant's right to set off—See ACT II OF 1901 (AGRA TENANCY), No. 14, 4 A.L.J. 681.

Settlement.

(1) A voluntary deed, not containing the power of revocation, is liable to be set aside as void and not binding upon the settlor, if the Court is not satisfied by the person seeking to uphold it, that the absence of that power and its effect were not duly explained to the settlor. **Ashibai v. Abdulla Haji Mahomed**, 8 Bom. L.R. 652=31 B. 271.

CHANDAVARKAR, J.

Shamilat land.

(1) Burden of proof—Presumption of accuracy of entries made in settlement records.

The defendant's ancestor purchased orally a proprietary holding in 1864 and since then the names of the vendee and his heirs appeared in settlement papers as proprietors. There was nothing to show that the sale did not include *shamilat* lands. The plaintiff claimed exclusive right to such lands. He failed to prove his exclusive possession.

Held, that the suit must be dismissed. **Sant Singh v. Jwala Singh**, 10 P.L.R. 1907=34 P.W.R. 1907.

KENSINGTON and CHITTY, JJ.

(2) Rights in—Burden of proof—Waste lands in Jhang District.

The plaintiffs sued for declaration that only members of the *Bhutia* tribe were entitled to share in the village *shamilat* lands and the defendants, who were *Aroras* by caste, had no right in them. There was nothing in the village records, which stated that the lands were *shamilat* of the village, to indicate that the sales made in favour of the ancestors of the defendants which took place in 1836 and 1851, did not carry with them rights in the *shamilat*. The sale-deeds were silent as to them. It was

Shamilat land.—(Concluded).

not shown that the defendants were excluded from a share in the enjoyment of such profits as might have been derived from the *shamilat*.

Held, that the claim must be dismissed. **Duni Chand v. Muhammad Baksh**, 8 P.L.R. 1907 = 36 P.W.R. 1907.

KENSINGTON and CHITTY, JJ.

- (3) *Trespasser acquiring right to proprietary holding by adverse possession—Right to shamilat land.*

In 1863 one G. claimed 25 *ghumaos* of land from S. by right of ownership, but the suit was dismissed as barred by limitation, it having been found that S. had first obtained possession of G's land in pre-British times. Since then S. and his descendants were recorded in revenue and settlement papers as proprietors of the land and the *shamilat* lands were described as owned by the proprietors. It was contended in this suit that S. and his descendants were not entitled to a share in the *shamilat* land, for even if S. became owner of the 25 *ghumaos* by adverse possession, it did not follow that he thereby became owner of a proportionate share of the *shamilat*, and even if G. lost his rights in the *shamilat* at the same time that he lost his rights in the proprietary holding, the former rights should be held to revert to the other co-sharers in the village.

Held, that the contention was not valid. **Jalal v. Bell Ram**, 9 P.L.R. 1907 = 37 P.W.R. 1907.

RATTIGAN and LAL CHAND, JJ.

Shares.

(1) Applicability of doctrine of *mushaa* to—See MAHOMEDAN LAW (GIFT), No. 2, 4 A.L.J. 572.

(2) —in a limited Company whether valid subject of *wakf*—See MAHOMEDAN LAW (WAKF), No. 3, 9 Bom. L.R. 1837.

Shebait.

- (1) *Shebait*, one of several, suit by, of Muth—Primogeniture, custom of—Eldest son, sole shebait—Suit for recovery of possession—Mortgage-decree, declaration, suit for, invalid and not binding—Hindu Law—Mitakshara—Brothers, one of the substitution of—Survivorship—Custom of Muth—Suit for possession on ejectment, conversion of, into one for redemption, if and when allowable—Co-shebait, made defendants—Refusal to join as plaintiffs—Collusion when not proved or alleged.

Shebait.—(Continued).

Where property belonging to an endowment is sought to be recovered from a third party, who asserts that he is the owner thereof, all the trustees of the endowment should be made parties to the suit, and such of them as refuse to join as plaintiffs should be made defendants. All the trustees should ordinarily be co-plaintiffs, and only such of them should be made defendants as are unwilling to be joined as co-plaintiffs, or have done some act precluding them from being plaintiffs; because, where the administration of the trust is vested in several trustees, they all form, as it were, but one collective trustee, and they must exercise the powers of their office in their joint capacity. Their interest and authority being equal and undivided, they cannot act separately, but all must join (a).

Upon the death of one of several joint trustees, the validity of the exercise of the trust powers by the survivors depends upon the nature of such powers; if these powers are coupled with an interest, or are annexed to the office of the trustee, they will pass with the trust to the survivors and can be exercised by them.

As regards the members of a Mitakshara family who are joint *shebait*s, the right of *shebaitship* passes by survivorship; and, consequently, upon the death of the original plaintiff, the right to prosecute the suit or an appeal preferred by him vests by survivorship in all his brothers, and one of them is not competent to obtain an order for substitution, as if he is alone entitled to the office of *shebait* (b).

Although a suit, brought as one for possession, may, in the discretion of the Court, where the circumstances of the case permit, be equitably converted into one for redemption, which could only be allowed when the mortgage is a valid and binding one, a plaintiff must ordinarily succeed on the case he has made in the plaint, and, unless there are special circumstances, an action instituted for purposes absolutely inconsistent with redemption cannot properly be converted into an action to redeem, as it would in reality amount to the conversion of a suit of one character into a suit of another and inconsistent character (c). **Kokilasari Dasj v. Mohunt Rudranand Goswami**, 5 C.L.J. 27.

RAMPINI and MOOKERJEE, JJ.

References:—(a) 11 C. 338; 8 I.A. 135; 8 C. 42; 11 Ch. D. 121; 88 Fed. Rep. 599, referred to.

Shebait.—(Concluded).

26 C. 409, *Distd.* (b) 33 C. 507, R; 26 C. 409, *Distd.* (c) 5 C. 265; 5 C. 269; 6 C. 317; 8 C.W.N. 325; 19 A. 541; 21 A. 235; 5 Moore P.C.C. 393; 35 Beav. 353; (1891) A.C. 69, R; 8 C. 79; 8 C. 690; 12 C. 414; 28 C. 517; 6 B. 495; 6 B. 515; 7 B. 146; 7 B. 526; 8 B. 168; 10 B. 88; 20 B. 196; 4.A.C. 391, *explained and distinguished*.

(2) —right, alienation of, to co-shebait—See **RELIGIOUS ENDOWMENTS**, No. 6, 12 C.W.N. 98.

(3) Judgment, against, binds his successors—See **ESTOPPEL**, No. 2, 6 C.L.J. 621.

(4) Permanent lease by shebait of debutter property void—See **DEBUTTER**, No. 2, 12 C.W.N. 68.

Custom of pre-emption on sale of, obtaining in Amritsar—See **PRE-EMPTION**, No. 33, 113 P. R. 1906=99 P.L.R. 1907.

Silence.

(1)—when operates as estoppel—See **ACT VIII OF 1885 (TENANCY, BENGAL)**, No. 36, 6 C.L.J. 601.

Small Cause Court.

(1) *Jurisdiction of, to award compensation for erroneous attachment before judgment*—S. 491, C.P.C.

By Sch. II of the C.P. Code, Ch. XXXIV of the Code, relating to arrest and attachment before judgment, is extended to the provincial Courts of Small Causes, except as regards immoveable property. This exception prohibits the Small Cause Court not only from ordering attachment of immoveable property, but also from determining the question of compensation, in case an attachment is ordered by mistake. That Court has, therefore, no power to allow compensation under S. 491 of the Code, and its order so far is *ultra vires*. Such a case is not one of compensation for improper attachment provided for by S. 491, but one for an attachment, which the Court had no power to order. **Baru Mal v. Munir Khan**, 77 P.R. 1907=50 P.W.R. 1907.

LAL CHAND, J.

(2) *Execution—Transfer to regular Court—Order in execution—Appeal—Second appeal*—Civ. Pro. Code, Ss. 244 and 586.

Where a Small Cause Court decree was sent for execution to the regular Court of the

Small Cause Court.—(Concluded).

district, and an order was passed under S. 244, C.P.C., by that Court (which was a Court of a Sub-Judge).

held—that an appeal lay to the Court of the District Judge against such order.

But the value of the decree being less than Rs. 500, a second appeal was barred by S. 586, C.P.C. **Peary Lal Sing. v. Radha Nath Sing**, 11 C.W.N. 861.

RAMPINI and SHARFUDDIN, JJ.

(3) Abolition of, after decree—Execution of decree—Jurisdiction—See **ACT IX OF 1887 (PROVINCIAL S.C. COURTS)**, No. 5, 30 M. 217.

(4) Jurisdiction of High Court to stay proceedings in,—Reference to arbitration—See **ACT IX OF 1899 (INDIAN ARBITRATION)**, No. 2, 8 Bom. L. R. 955=31 B. 236.

(5) Judge of, not bound to fully set out the reasons for his findings—See **CIV. PRO. CODE**, No. 117, 6 C.L.J. 527.

Small Cause Courts Act (Presidency).

See **ACT XV OF 1882**.

Small Cause Courts (Presidency Towns).

(1) High Court's power to revise proceedings in the Bombay Court of Small Causes—See **CIV. PRO. CODE**, No. 303, 8 Bom. L.R. 969=31 B. 138.

Small Cause Courts Provincial Act.

See **ACT IX OF 1887**.

Small Cause Court Rules (Presidency).

Rule 220, effect of—Restraint upon anticipation—See **ACT III OF 1874 (MARRIED WOMEN'S PROPERTY)**, No. 1, 17 M.L.J. 363.

Small Cause Suit.

(1) Suit against tenant for damages for cutting wood, nature of—Appeal—Second appeal—See **LANDLORD and TENANT**, No. 3, 6 C.L.J. 218.

(2) Incidental determination of question of title, effect of—See **RES JUDICATA**, No. 6, A.W.N. (1907), 218.

(3) Suit for rent and for a declaration as to the propriety of *patta* granted to tenant—Second appeal—See **CIV. PRO. CODE**, No. 296, 1 M.L.T. 314=16 M.L.J. 477=30 M. 101.

(4) Application for review of judgment in, rejected—Revision—See **CIV. PRO. CODE**, No. 306, A.W.N. (1907), 182.

Small Cause Suit—(Concluded).

(5) Trial of, as ordinary suit by lower Courts, effect of—High Court's powers of interference—See ACT IX of 1887 (PROVL. S.C. COURTS), No. (1-a), 1 M.L.T. 414=30 M. 41.

(6) Appeal from order of remand in—See LIMITATION ACT, No. 64, 11 C.W.N. 862.

Solicitor.

- (1) *Professional misconduct of—Information obtained as the solicitor of one party could be utilised under certain circumstances while acting for another.*

Though those things, which an attorney learns from his client or in consequence of his employment by his client, he is forbidden to disclose, and any betrayal of his confidence would be visited by the Court as gross misconduct, yet, if he learns matters relating to his client, under such circumstances that, if questioned about them in a Court of justice, he could not refuse to answer them, he is not within the Court's jurisdiction (a).

A solicitor is not guilty of misconduct, because, having changed sides, he uses, for his new client, information acquired from his old client, if it was open to him to obtain such information from public sources (b). *In re M. B. Chothia*, 9 Bom. L.R. 38=5 Cr. L.J. 265.

CHANDAVARKAR, J.

References :—(a) 16 L.T. (N. S.), 715, followed; (b) 25 W.R. 603, 3 B. 94, R.

(2) Extra remuneration to, for expert evidence—See EXPERT EVIDENCE, No. 1, 9 Bom. L.R. 819.

(3) Recovery of costs due to—Summons—See LIMITATION ACT, No. 125, 9 Bom. L.R. 508.

Special Bench.

Jurisdiction to consider Full Bench decision other than that referred for consideration—See LIMITATION ACT, No. 6, 11 C.W.N. 959.

Specific performance.

- (1) *Suit for—Pleadings—Practice—Plea in defence—Omission of material term in written contract—Onus—Duty to examine himself—Agreement to take lease on lessor erecting suitable buildings—Time, if essence of contract—Reasonable time—Witness—Evidence—Credibility.*

In a suit for specific performance, it is important to distinguish between negotiation and contract, and to ascertain what the contract is,

Specific performance.—(Continued).

when and by whom it was made, and who the parties are who are bound by it.

Where a party concluded a contract with another party, without at any time disclosing that he was acting in the matter as agent for some other person, whether he was really acting as such agent or not, the burden of the contract rested on him, the other party not being concerned with his undisclosed intentions.

If the plaintiff's case is clear and the written statement of the defendant raises no defence, the practice in English Courts allows the plaintiff, in a suit for specific performance, to move for a decree on the written statement being put in, and to get such a decree at once and as a matter of course.

It is incumbent on a party, who seeks to make out that, by inadvertence or mistake, an important term has been omitted from a contract drawn up by himself with his own hand and signed by him, to pledge his oath to the truth of his story, specially when the other party comes forward and swears that the suggestion is without foundation.

G. & Co. agreed to take a lease of certain premises from H. at a certain rent, upon the latter undertaking to erect new buildings (on a plan which G. & Co. approved), to replace existing ones, which were, to the knowledge of both parties, in the occupation of tenants, whom it might take time to eject.

Held that time was not made the essence of the contract, thought it was clear that, in the contemplation of both parties, the buildings were to be completed without unreasonable delay. In case of undue delay on the part of H, the other parties (G. & Co.) might have made time the essence of the contract, by giving notice that they would not hold themselves bound to complete, unless the buildings were finished within a specified time, provided the time allowed were such as the Court would hold to be reasonable under the circumstances.

It is not incumbent upon a party to give corroborative evidence of statements, which are not challenged by the other party. *Moulvie Mahomed Ikramull Huq v. Wilkie*, 11 C.W.N. 946 (P.C.)=17 M.L.J. 454=4 A.L.J. 740=6 C.L.J. 682=2 M.L.T. 448.

LORD ASHBORNE, LORD MACNAGHTEN, LORD ATKINSON, and SIR ARTHUR WILSON.

(2) Agreement between divided brothers as regards estate of a deceased divided brother—

Specific performance.—(Concluded).

Widow of deceased not a party to the agreement—Specific performance—Limitation—See HINDU LAW (REVERSIONERS), No. 3, 17 M.L.J. 505.

(3)—of contract to sell his share by a member of a joint Hindu family—Parties to suit—See HINDU LAW (JOINT FAMILY), No. 15, 3 N.L.R. 160.

(4) of contract by guardian—See GUARDIAN and MINOR, No. 3, 11 C.W.N. 207.

(5) Contract to sell by guardian with Court's permission—Subsequent sale with permission for higher price—Whether first contract is specifically enforceable. See GUARDIAN and MINOR, No. 4, 4 A.L.J. 24.

Specific Relief Act.

(1) S. 9—*Suit on title—dispossession within six months before suit.*

In a suit for possession as usufructuary mortgagee of an occupancy holding, it was found that the plaintiff obtained possession in January, 1905. The defendants dispossessed the plaintiff in July, 1905, who, next month, instituted a suit in the Civil Court for possession of the fields. The plaintiff never pleaded S. 9 of the Specific Relief Act in the Courts below which dismissed the suit. The plaintiff appealed to the High Court.

Held, that the plaintiff was entitled to be put back into possession of the fields in suit (a). **Parbhu Lal v. Ram Charan**, 4 A.L.J. 601 = A.W.N. (1907), 244.

AIKMAN, J.

References :—(a) A.W.N. (1893), 163 and A.W.N. (1897), 145, F.

(2) S. 9—Compromise of suit under—Effect of—See CIV. PRO. CODE, No. 215, 3 L.B.R. 243.

(2-a) Ss. 12 and 21 (a)—Suit for recovery of property based on title acquired under a mortgage deed—Whether suit for specific performance—Whether money compensation an adequate relief—See *SUIT*, No. 1, 10 O. C. 218.

(3) S. 18—*Suit for specific performance—Contract of sale of mortgaged property—Mortgage undisclosed—T. P. Act. S. 55 (5) b.*

In a suit by the plaintiff for the specific performance of a contract of sale of a piece of land or, in the alternative, for the return of the earnest money and for damages for breach of the contract, it was *held*,

Specific Relief Act.—(Continued).

1. that the plaintiff was entitled to a decree for specific performance of the contract of sale, under S. 18 of the Specific Relief Act.

2. and, that, as the land contracted to be sold was burdened with a mortgage, which fact was not disclosed to the plaintiff when the oral contract for sale was made, the plaintiff was entitled under S. 55 (5) (b) of T. P. Act, to retain out of the purchase-money, the amount payable to the mortgagee, if the defendant did not pay off the mortgage before executing the conveyance. **Ba Pe v. Ma Ma**, 4 L.B.R. 86.

IRWIN and HARTNOLL, JJ.

Reference :—11 Bur. L.R. 257, R.

(4) S. 21—*Suit for damages for breach of contract—agreement to refer to arbitration any dispute arising under the contract.*

Plaintiff sued for damages for breach of a contract. The defence was that the suit was unsustainable, on the ground that there was a stipulation in the contract in question, to refer the dispute arising thereunder to arbitration, and that the plaintiff ought not to have sued in the face of that stipulation. There was no evidence to show, either that the defendant proposed to refer to arbitration before the suit was brought or that the plaintiff refused to proceed to arbitration. *Held*, that S. 21 of the Specific Relief Act can be relied on as bar to a suit on a contract, only in case of a refusal by plaintiff to refer the dispute to arbitration, and that, in this case, no such refusal on the part of the plaintiff having been proved, the defence was unsustainable. **Ralli v. Walaiti Ram**, 80 P.R. 1906 = 70 P.L.R. 1907.

CHITTY, J.

References :—5 C. 498 and 5 C.L.R. 284, F.

(4-a) S. 21 (a)—See No. 2-a, *supra*.

(5) S. 23 (c)—Particip deed beneficial to minor member of joint Hindu family—His right to sue on the deed—See HINDU LAW (PARTITION), No. 3, A.W.N. (1906), 261 = 29 A. 37.

(6) S. 24, cl. (b)—*Suit by mortgagee to recover mortgage money not a suit for specific performance—Damages arising from failure to pay off a prior mortgagee, separate suit for—Undue influence—Void or voidable contract—Contract Act, Ss. 39 and 54—Set-off.*

A mortgagee brought a suit to recover his mortgage money, principal and interest, according to the terms of his mortgage bond. It was

Specific Relief Act.—(Continued).

found that the mortgagee had not paid a portion of the mortgage-money to a prior mortgagee as stipulated in the bond. The defendants, mortgagors, contended that the suit should be considered to be one for specific performance under S. 24, cl. (b) of the Specific Relief Act and that, as the plaintiff mortgagee had failed to perform his part of the contract by not paying off the prior mortgage, the defendants were not bound to carry out their part of the contract, and all that the plaintiff was entitled to recover was the balance of the principal amount found to be actually due and such interest as the Court might consider fair, the provision as to compound interest being unenforceable as having been obtained by undue influence.

Held, that this was a suit for recovery of money, based on a mortgage-bond, and could not be regarded as one for specific performance under S. 24 (b) of the Specific Relief Act.

Held, further, that there being no evidence of undue influence and the deed not having been shown to be either void or voidable, the provision to pay compound interest according to the terms of the deed must be enforced.

Held, also, that the defendants could, in a separate suit, sue the plaintiff mortgagee for recovery of such damages as may have accrued to them owing to the mortgagee not having paid off the prior mortgage. **Rani Raghubans Kuar v. Raunak Ali**, 10 O.C. 69.

SCOTT and RYVES, J. CS.

References :—8 O.C. 5, S. C. 280, 18 M. 126, R.

(7) S. 27 (b)—Sale by registered deed to one person—Prior verbal sale to another—Notice—See **SALE**, No. 3, 4 L.B.R. 26.

(8) S. 42—Mortgage by qualified owner—Suit by reversioner for declaration of his right to redeem—Discretion of Court.

Where a woman, having only a life interest, mortgaged a portion of the property, and the reversioners sue for a declaration of their right to redeem the mortgage in the event of her death, the Court should not, in the exercise of the discretion conferred by S. 42, make the declaration. Because, the woman's right to redeem might possibly become time-barred before her death, and the mortgagees are entitled to the benefit of this contingency. Further, it may be that, when the right now vested in her passes to the reversioners, they may be unwilling or un-

Specific Relief Act.—(Continued).

able to exercise it. **Muthukaruppan v. Kasi-nathan Pillay**, 2 M.L.T. 67.

WHITE, C. J., and BENSON, J.

(9) S. 42—Declaratory suit—Omission to seek further relief, when such relief is possible—Duty of Court—Amendment of plaint.

Plaintiff sued to have cut certain trees on his land, which had been sold to defendant. The suit was couched in the form of a declaratory suit to the effect that the defendant was not entitled to keep the trees standing on the plaintiff's land. The original Court gave the plaintiff a declaratory decree to the above effect, with a direction that the defendant should cut the trees. The lower Appellate Court dismissed the suit, on the ground that the plaintiff, being able to seek further relief, had omitted to claim it. *Held*, by the Chief Court, that the lower Appellate Court should have directed the plaintiff to amend the plaint by asking for the further relief *viz.*, a permanent injunction to restrain the defendant to allow the trees to stand on his land and to cut them. **Hazara Singh v. Bishen Singh**, 128 P.R. 1907.

CLARK, C. J.

(10) S. 42—Suit to establish the right to attach certain property—Civ. Pro. Code, S. 283—Consequential relief.

S. 283 of the Civ. Pro. Code says nothing about consequential relief. So, a suit brought under that section is not affected by the proviso to S. 42 of the Specific Relief Act. **Kya Get v. Bu Nwe**, 22 T.L.R. 88.

HARTNOLL, J.

Reference :—2 L.B.R. 124, D.

(10-a) S. 42—Suit by removed trustee for declaration of his trusteeship—See **TRUSTEE**, No. 1, 9 Bom. L.R. 514.

(11) S. 42—Suit by daughter's son for a declaration that a gift by a Hindu widow to her daughters, and sale by one daughter to another, are void beyond widow's life-time—See **HINDU LAW (ALIENATION)**, No. 5, 4 A.L.J. 677.

(11-a) S. 42—See **CUSTOM (PECULIAR TO PUNJAB)**, No. 39-b, 72 P.R. 1906=108 P.L.R. 1907.

(12) S. 42, cl. (2)—Declaration that a certain land is exclusive property of appellant—Jurisdiction of Civil Court to grant such a declaration—Land Revenue Act (N.W.P. and Oudh), S. 238—See **JURISDICTION (CIVIL COURTS)**, No. 7, 10 O.C. 204.

Specific Relief Act.—(Concluded).

- (13) S. 42, *ills. (e) and (f)*, Scope of—*Presumptive reversionary heir entitled after widow's death—Suit to set aside the will of last male owner.*

A presumptive reversionary heir, entitled to inherit after the death of the widow of the last male owner, is entitled to sue for declaration that an alleged will, under which other persons claimed the property as devisees, was made under undue influence and coercion, and is, therefore, invalid as against his reversionary right.

The right of the presumptive reversioner to sue for declaration under S. 42 of the Act, is not confined to the case of transactions by the widow herself, as are referred to in *ills. (e) and (f)* to the section; nor is such a reversioner bound to show collusion, acquiescence or laches on the part of the widow, before he is allowed to institute the suit (*a*). **Puttanna alias, Keshava Bhatta v. Ramakrishna Sastri**, 30 M. 195 = 17 M.L.J. 374.

SUBRAHMANIA AIYER and BENSON, JJ. •

Reference :—(*a*) 6 C. 764 (P.C.), *D*.

- (14) Ss. 53, 54 and 55—See INJUNCTION, No. 2, 34 C. 97.

(14-a) S. 54—See No. 14, *supra*.

(15) Ss. 54 and 55—Prohibitory and mandatory injunctions—Obstruction to light and air—Discretion of Court to grant injunction or damages—See EASEMENTS ACT, No. 2, 3 N.L. R. 114.

(16) S. 55—See Nos. 14 and 15, *supra*.

Spes Successionis.

Transferability and releasability of—Transfer of Property Act, S. 6 (*a*)—See MAHOMEDAN LAW (SUCCESSION), No. 2, 8 Bom. L.R. 781 = 31 B. 165.

Stamp.

Petition of compromise containing recital of a previous oral agreement for lease, whether requires stamp—See REGISTRATION ACT (III of 1877), No. 4, 12 C.W.N. 59.

Stamp Acts (I of 1862, XVIII of 1869, I of 1879, II of 1899).

- (1) Construction of—*Maxim*—*Ut magis valeat quam pereat*—*Promissory note*—*Bond*—*Attestations*.

Effect should be given to the maxim *ut magis valeat quam pereat* in any difficulty under the Stamp Act; so that, where there is a reasonable

Stamp Acts (I of 1862 XVIII of 1869, I of 1879, II of 1899).—(Concluded).

doubt whether a paper is subject to stamp at all, the Courts should decide strictly against the Exchequer and beneficially in favour of the subject. The principle loses force where the question is, not so much whether a paper is liable to stamp, as whether it is liable to stamp, in one character or another; and it has no application at all where the words of the Statute directly cover the case. The sphere within which the maxim can be usefully applied under the stamp law is limited to cases of general expression.

Stamp objections are the care of the Court, and when they are raised, it is for the Court to decide whether they ought to be sustained, without any regard to the ground, as being the sole and only possible ground upon which the objection may have been taken.

Under the Stamp Act, 1899, a promissory note, unless it is payable to order or bearer, is to be deemed a bond if attested. **R. D. Sethna v. Mirza Mahomed Shirazi**, 9 Bom. L.R. 1034.

BEAMON, J.

Stamp Act (II of 1899).

- (1) S. 2, cl. (10), Art. 62, cl. (b)—*Contract*, *assignment of*—*Chose in action*.

A document, which assigned the benefit of a contract to the plaintiff, contained the words "I have sold the whole of my right and interest in this contract and in the goods mentioned therein to the plaintiff:—

Held, that the document was a chose in action and, therefore, came under S. 2, cl. (10) of the Stamp Act, and that an *ad valorem* stamp would be necessary. **Nathu Gangaram v. Hansraj Morarji**, 9 Bom. L. R. 119.

RUSSELL, J. •

References :—1 K.B. 297, 22 B. 632, *R*.

- (2) S. 2, cl. 15, Art. 45 (c)—*Instrument of partition*—*Award directing a partition*—*Stamp*.

An award, whereby the arbitrators indicate the division of property among the rival litigants, is an instrument of partition, within the meaning of S. 2, cl. 15 of the Act. **Kalidas Lalbhai v. Trjbhuwandas Bhagwandas**, 8 Bom. L.R. 869 = 31 B. 68.

RUSSELL, AG. C.J. and BEAMON AND HEATON, JJ.

Stamp Act (II of 1899).—(Continued).**(3) S. (2), cl. 17—Trust-deed for securing mortgage debentures—Stamp duty.**

A document was endorsed as a "trust-deed for securing mortgage debentures" and was executed for the purpose of securing money to be advanced by way of loan. It was argued, on behalf of the executants of the deed, that it cannot be regarded as a mortgage-deed, because it did not itself purport to transfer to, and vest in, the trustees any interest in the properties specified in the document. *Held* that, as the trustees were given the right to have the properties vested in them, to be held by them as trustees for the debenture-holders and as security for the amount to be advanced on the debentures, and as they were given the usual rights of entry, taking possession and management, which mortgages and trustees for debenture-holders are usually given, the deed created rights over the properties in favour of the trustees, and was a mortgage deed under the definition in S. 2 (17), Stamp Act. 4 L.B.R. 2 (F.B.).

FOX, C. J., BIGGE and HARTNOLL, JJ.

References:—27 C. 587, 1 Q.B.D. 361, *R.*

(3-a) S. 23—See Nos. 9 and 10, *supra*.

(4) S. 24, has no connection with question of liability to registration—See SALE, No. 2, 3 N.L.R. 72.

(5) S. 35—*Unstamped promissory note, inadmissibility of, in evidence—Suit whether maintainable on the verbal agreement embodied in the note—Admission of execution of a deed is not the same as admission of a liability thereunder.*

Plaintiff sued to recover money from the defendant, alleging that defendant had executed a pro-note in his favour on account of rent due, and that, as the said pro-note was not properly stamped, he claimed the same as a debt due under a prior book account. The suit, as based on such account, was admittedly barred by limitation at the date of its institution. It was contended on appeal that the suit was maintainable on two other grounds, *viz*:—

(1) When the pro note was executed, the defendant had agreed verbally to pay the amount in question on a certain date and that limitation, therefore, began to run from that date.

(2) Plaintiff could rely upon defendant's admission of the execution of the pro-note, leaving it to him to prove the repayment of the amount.

Stamp Act (II of 1899).—(Continued).

Held (1) as the oral agreement was, on the same day, embodied in a written agreement (pro-note), the pro-note alone can supply the evidence of the agreement and (a) the latter cannot be proved *aliunde* (S. 91, Evidence Act); (2) the admission as to the execution of the deed could not be relied on, in respect of the liability thereunder. Under these circumstances, granting plaintiff a decree would be 'acting upon' and giving effect to the pro-note, a document, which, under S. 35 of the Stamp Act, could not be admitted and acted upon by a Court for any purpose (b). **Ganga Ram v. Amir Chand**, 66 P.R. 1906=73 P.L.R. 1907.

JOHNSTONE and RATTIGAN, JJ.

References.—(a) 24 B. 360, *F*; 20 P.R. 1883; *R.* (b) 18 B. 369 and 21 B. 201 (F.B.), *F*.

(6) S. 35—*Unstamped instrument not admissible for any purpose—Secondary evidence.*

An instrument, which is chargeable with stamp duty and is not so stamped, is, unlike an invalid instrument which is receivable for collateral purposes, not admissible for any purpose whatsoever, save in criminal cases. Secondary evidence of its execution or contents is not receivable, even if it be merely for the purpose of showing the nature of possession transferred by such instrument. **Thaji Beebi v. Tirumalaiappa**, 17 M.L.J. 808=80 M. 386.

SUBRAHMANIA AIYAR and MILLER, JJ.

(7) Ss. 35 (a), 38, cls. (1) and (2)—*Impounded instrument admissible in evidence on payment of penalty—Court bound to accept the instrument.*

When an instrument, not being one of the excepted instruments, in sub-section (a) of S. 35 of the Stamp Act, is tendered in Court, the Court is to accept it, and shall admit it as evidence, on payment of the duty; and the person tendering it is entitled to compel the Court to accept the instrument if the duty and penalty are paid.

S. 35 of the Stamp Act does not prevent an instrument, which is not absolutely rejected, or which comes within the excepted ones, from being admitted on payment of penalty. **Nathu Gangaram v. Hansraj Morarji**, 9 Bom. L.R. 122.

RUSSELL, J.

(7-a) S. 38 (1) and (2)—See No. 7, *supra*.

(8) Ss. 40 and 42—*Stamped—Effect of Collector's certificate that document is properly stamped.*

Stamp Act (II of 1899).—(Concluded).

A Subordinate Judge, finding that a document upon which the plaintiff's suit depended was not properly stamped, impounded the document and sent it to the Collector, meanwhile dismissing the plaintiff's suit. The Collector certified under section 40 of the Indian Stamp Act, 1899, that the proper amount of duty and penalty had been realized. *Held*, that the document then became admissible in evidence and the Court should have taken it into consideration. **Umda Bibi y. Tikai Ram**, A.W.N. (1907) 38 = 4 A.L.J. 205.

BANERJI and AIKMAN, JJ.

(8-a) S. 42—See No. 8, *supra*.

(9) *Sch. I, Art. 5, cl. (b), Art. 1, and S. 23*—Hatchitta, containing stipulation to pay interest—Acknowledgment or agreement—Stamp-duty.

Held that the document sued upon was not a mere acknowledgment of a debt, inasmuch as it contained a stipulation that the amount should bear interest at a certain rate, and should therefore have been stamped as an agreement or memorandum of agreement with a stamp of as. 8 under cl. (b) of Art. 5 of Sch. I of the Stamp Act. **Mulchand Lala y. Kashibullah Biswas**, 11 C.W.N. 1120.

RAMPINI, C.J., CASPERSZ and SHARFUDDIN, JJ.

Reference:—25 B. 373, *relied on*.

(10) *Sch. I, Art. 5, cl. (b) and Art. 1, and S. 23*—Hatchitta containing implied promise to pay interest whether acknowledgment of debt, or agreement or memorandum of agreement—Stamp-duty.

A hatchitta ran as follows:—“Account E.B. (the debtor). The year 1312, B.S. Interest on this amount at the rate of 1 anna per month per rupee.” Then followed the credit and the debit entries.

Held that there was an implied promise to pay interest, and the document ought to be stamped as an agreement or a memorandum of agreement with an eight-annas stamp, and not as an acknowledgment of a debt with a one-anna stamp only (a). **Enatullah Biswas y. Gajaruddi Biswas**, 11 C.W.N. 1122.

RAMPINI, C.J. and SHARFADDIN, J.

References:—(a) 27 A. 84, *Diss*; 25 B. 373, *F*; 25 W.R. 361, 4 C. 885, *D*.

(11) Art. 45 (c)—See No. 2, *supra*.

(12) Art. 62 (b)—See No. 1, *supra*.

Step in aid of execution.

(1) Application for personal decree where it was not necessary—Application in accordance with the law—See LIMITATION ACT, No. 130, 4 A.L.J. 40.

(2) Minority of decree-holders at the date of application for an order absolute, effect of—See LIMITATION ACT, No. 18, 4 A.L.J. 145.

(3) Application asking time to find out address of judgment-debtor is a—See LIMITATION ACT, No. 136, 4 A.L.J. 184.

(4) Effect of application to bring decree into accordance with judgment—See CIV. PRO. CODE, No. 90, A.W.N. (1907). 169.

Stranger.

—to suit, managing the conduct of the suit, when bound by the decree—See ESTOPPEL, No. 2, 6 C.L.J. 621.

Sub-mortgage.

(1) Mortgage by mortgagee of his rights as such, but without assignment—Rights of sub-mortgagee as against original mortgagee—Rights of puisne mortgagee—Transfer of Property Act (IV of 1882), Chap. IV—“property”, meaning of.

G.P. and J.K. executed a mortgage deed, whereby they mortgaged their mortgagee rights in certain properties, but made no assignment of the mortgage. The sub-mortgagees brought a suit for sale of the mortgaged properties.

Held that the sub-mortgagees were entitled to bring to sale the interest mortgaged to them subject to the rights of redemption of the original mortgagor (a).

Per STANLEY, C.J.—The words ‘mortgaged property’ are used throughout Chapter IV of the Transfer of Property Act, as meaning the interest in specific immoveable property, which the mortgagor professes to transfer, whatever that interest may be.

The words “property comprised in the mortgage”, as used in S. 85, were probably intended to denote no more than the estate or interest, which is the subject of any particular mortgage, that is, if the mortgage be a mortgage of the absolute estate in the land, then the land itself, if it be a *puisne* mortgage, then the interest in the land of the mortgagor, that is, the equity of redemption. This would give the words the same meaning as the words ‘mortgaged property’ as used in S. 25 of the English Conveyancing Act of 1881.

Sub-mortgage—(Continued).

In a properly constituted suit, a *paisne* mortgagee may have a sale of the interest mortgaged to him, subject to the rights of a prior incumbrancer. *Query*—Whether such incumbrancer is a person having an interest in the equity of redemption, which alone can be the subject of a subsequent mortgage, within the meaning of S. 85, Transfer of Property Act? He holds under a paramount title and cannot be prejudiced by a sale of the equity of redemption.

Per BANERJI, J.—There is nothing in the Transfer of Property Act which forbids a sub-mortgage. In the case of a sub-mortgage, the property, which is the subject of the mortgage, is the interest of the sub-mortgagor as the original mortgagee. And as it is this interest which is the mortgaged property, the sub-mortgagee is entitled, under S. 67 of the Act, to an order for the sale of such interest. Any other view would place the sub-mortgagee in the same position as the holder of a simple money debt, and the pledge made in his favour would be no security at all.

Per AIKMAN, J.—In the Transfer of Property Act, the Legislature has divided the Act into sets of sections with headings prefixed. These headings may be regarded as preambles to those sets of sections, and may, therefore, be legitimately consulted for the purpose of ascertaining the meaning of the statute.

There is no privity between the sub-mortgagee and the original mortgagor. There is nothing in the Transfer of Property Act, which would render a sub-mortgage invalid, or prevent its enforcement as a lawful contract (*b*). **Ram Shankar Lal v. Ganesh Parshad**, 4 A.L.J. 273 (F.B.)=A.W.N. (1907), 97=2 M.L.T. 248=29 A. 385.

STANLEY, C.J., KNOX, BANERJI, BURKITT, and RICHARDS, JJ.

References :—(*a*) 18 A. 113, *overruled*. (*b*) 18 A. 432, *Diss.* 8 A. 105 (F.B.), *Appr.*

(2) *Mortgagee's right to—Sub-mortgagee's right on redemption by original mortgagor*.
Notice—Privity between original mortgagor and sub-mortgagee.

A mortgagee may make a sub-mortgage of his interest in the mortgaged property. There is privity between a mortgagor and his sub-mortgagee. If the original mortgagor, at the time he paid the mortgage money to his mortgagee, had no notice of the existence of a sub-mortgage, the sub-mortgage is extinguished and

Sub-mortgage—(Concluded).

the sub-mortgagee has no claim upon the original mortgagor and cannot hold the property against him; but if the original mortgagor had such notice, the mortgage debt due to the sub-mortgagee is not discharged by the payment to the original mortgagee, and the sub-mortgagee is entitled to hold the mortgaged property, until his sub-mortgage is redeemed. **Nga Kye v. Nga. Po Min**, U.B.R. 1906, Sub mortgage, 1.

SHAW, J.C.

References :—2 M. 212, 15 B. 692, 20 M. 35 20 B. 549, 18 A. 113, 12 P.R. 1825, R.

Subrogation.

(1) *What and when arises—"Legal" and "Conventional" subrogation, difference between—Subrogation by part-payment if allowable—Suit to enforce mortgage—Assignee of or purchaser from mortgagee—Necessary party—First and second mortgagee, questions between.*

• To entitle one to invoke the equitable right of subrogation, he must either occupy the position of a surety of the debt or must have made the payment under an agreement with the debtor or creditor that he should receive and hold an assignment of the debt as security, or he must stand in such a relation to the mortgaged premises that his interest cannot otherwise be adequately protected (*a*).

It is only in the case of "legal subrogation" or subrogation as a matter of right, as distinguished from "conventional subrogation" or subrogation by reason of agreement, that the question of intention to keep the mortgage alive arises.

The doctrine of subrogation is not applied for the mere stranger or volunteer who has paid the debt of another, without any assignment or agreement for subrogation, being under no obligation to make the payment and not being compelled to do so for the preservation of any rights or property of his own (*b*).

Subrogation is by redemption, and, unless there is redemption, subrogation cannot take place. The person who makes the payment cannot, by simply paying the interest as it accrues or paying or discharging a portion of the interest which has already accrued, claim a right of subrogation. He must pay the entire amount of an incumbrance which is senior to his own. Before one creditor can be subrogated to the rights of another, the

Subrogation.—(Continued).

demand of the latter must be entirely satisfied so that he shall be relieved from all further trouble, risk and expense (c). In a suit to enforce a second mortgage, the first mortgagee is not a necessary party. (d). **Gurdeo Sidgh v. Chandrika Singh and Chandrika Singh v. Rash Behary Singh**, 5 C.L.J. 611.

MOOKERJEE, and HOLMWOOD, JJ.

References;—(a) 42 N. Y. 89; 113 Georgia 31 = 38 S. E. 374; 105 Georgia 55 = 31 S. E. 794; 11 I. A. 126 = 10 C. 1035; 33 C. 1133; 29 I. A. 9 = 29 C. 154, R. (b) 24 U. S. 525, Speers Eq. (S. C.) 87; 3 Paige N. Y. 122; 14 N. J. Eq. 234; 116 N. Y. 566; 35 Kan. 495 = 57 Am. Rep. 187; 57 Illinois 318 = 11 Am. Rep. 18; 39 Wis. 749 = 20 Am. Rep. 63, R. (c) 11 Gray 276 = 71 Am. Dec. 713; 16 Iowa 68 = 85 Am. Dec. 504. 4 Woods. C. C. 645 = 18 Fed. Cases 792; 24 Georgia 346 = 71 Am. Dec. 136; 2 Harris and Gill (Maryland), 91, R. 18 B. 86, explained. (d) 1 C.L.J. 337 (349), followed.

(2) *Mortgage, subrogation, principle—Equity—Encumbrancer, prior and subsequent—Purchaser, assignee of, rights of.*

When money due upon a mortgage is paid, it shall operate as a discharge of the mortgage, or in the nature of an assignment of it, as may best serve the purposes of justice and just intent of the parties. It makes no difference whether the party, on payment of the money, took an assignment of the mortgage or a release, or whether a discharge was made, and the evidence of the debt cancelled. The debt itself may be held still to subsist in him who paid the money, as assignee, so far as it ought to subsist, in the nature of a lien upon the land and the mortgage be considered in force for his benefit, so far as he ought, in justice, to hold the land under it, as if it had been actually assigned to him.

The doctrine of subrogation is a doctrine of equity jurisprudence. It does not depend on privity of contract express or implied, except in so far as equity may be supposed to be imported into the transaction, and thus raise a contract by implication. It is founded on the facts and circumstances of each particular case and on the principles of natural justice. While, therefore, the doctrine will be applied, in general, wherever any person other than a mere volunteer pays a debt or demand, which in equity or good conscience should have been satisfied by another, or where the liability of one person is discharged out of a fund belonging to another,

Subrogation.—(Concluded).

or when one person is compelled, for his own protection or that of some interest which he represents, to pay a debt for which another is primarily liable, or wherever a denial of the right would be contrary to equity and good conscience, the doctrine will never be permitted, where the application of it would work injustice to the rights of those having equal or superior equities (a).

A purchaser of the equity of redemption, if he discharges the prior encumbrance, cannot claim to be subrogated to his rights, to the prejudice of the latter encumbrancer whose debt he had agreed to discharge (b).

The representatives of the purchaser of the equity of redemption are not entitled to be subrogated to the rights of the prior mortgagee because they had constructive, if not, actual notice of the debt due to the later mortgagee, and of the circumstance that their assignor had assumed payment of it (c). **Bissenwar Prasad v. Lala Sarnam Singh**, 6 C.L.J. 134.

MOOKERJEE and HOLMWOOD, JJ.

References;—(a) 2 C.L.J. 288 (298), 5 Grant 359, R. (b) 69 Missouri 529, R. (c) 16 M. 301, 2 Sch. and Lef. 315, 3 Jones and La Touche 1, R.

(3) *Right to claim, when arises.*—See MORTGAGE (GENERAL), No. 25, 6 C.L.J. 46.

Substituted securities.

Principle on which, should be ascertained—See MORTGAGE (GENERAL), No. 25, 6 C.L.J. 46.

Substituted service.

When may be accepted—See Act I of 1895 (PUBLIC DEMANDS RECOVERY, BENGAL), No. 1 5 C.L.J. 555.

Succession.

(1)—*among Syrian Christians—Absence of special usage—Applicability of the Indian Succession Act—Dispute between mother and widow.*

In the absence of any special usage or custom, the Syrian Christian Community of Travancore are governed by the Indian Succession Act, which embodies the enlightened views of large numbers of Christians, and which might therefore be applied to them as in consonance with justice, equity and good conscience. So, in a dispute between the widow and the mother of a deceased Syrian Christian, it was held that both of them were entitled to a moiety.

Succession.—(Concluded).

of his property. **Geevarghese Maria v. Kochukurian Maria**, 22 T.L.R. 192.

SADASIVA IYER, C.J., & GOVINDA PILLAI, J.

(2)—of daughter among Hindu converts to Christianity—Hindu law—Custom—Act X of 1865—Object of Act XXI of 1850,—See ACT X OF 1865 (SUCCESSION), No. 1, 52 P.W.R. 1907.

(3) See CUSTOMS (PUNJAB).

Succession Act (Indian).

See ACT X OF 1865.

Succession (Property Protection) Act.

See ACT XIX OF 1841.

Succession Certificate.

(1) *Separate certificates in respect of different moieties of the same debt.*

It may not be proper for a Court to grant separate certificates, in respect of different moieties of the same debt, but, after it has done so, they cannot be regarded as a nullity, by a Court, which is asked to order payment of the debtor to which they relate. **Sreenivasa Iyengar v. Sundararaja Iyengar**, 17 M.L.J. 37.

MILLER, J.

Reference :—27 A. 87, R.

(2)—grant of, to mother acting as guardian of minor son's property—See HINDU LAW GUARDIANSHIP, No. 1, 2 M.L.T. 246.

Succession Certificate Act.

See ACT VII OF 1889.

Suit.

(1) *Possession, suit for, by mortgagee, on default of payment of interest—Suit for specific performance of contract—Contract to transfer immoveable property—Specific Relief Act, Ss. 12 and 21 (a)—Suit for recovery of property based on title acquired under the mortgage-deed, not a suit for specific performance—Money compensation not an adequate relief.*

A mortgage-deed contained a stipulation that the interest was to be paid half-yearly and it was provided, that in case of default the mortgagee would be entitled to take possession of the property and hold it for 15 years. Default in the payment of interest having occurred, the mortgagee sued for possession. It was contended by the mortgagor that the suit for possession should be regarded as a suit for specific performance of a "contract for non-performance of which compensation in money is an adequate

Suit.—(Concluded).

relief" within the meaning of S. 21 (a) of the Specific Relief Act.

Held, that a suit like this was not a suit for specific performance of a contract (a).

Held, further, that the suit could not be regarded as a suit to enforce a contract to transfer immoveable property within the meaning of S. 12 of the Specific Relief Act, but that it was a suit for recovery of immovable property, based on a title acquired by the mortgagee under the terms of the mortgage-deed. (b) **Kalka Singh v. Himayat Ali**, 10 O.C. 218.

CHAMBER, J.C.

References :—(a) F.C.A. No. 46 of 1903, F. 2nd C.A. No. 239 of 1890, 5 O.C. 148, 6 O.C. 167, R. (b) 2 O.C. 24, Digs. 16 Eq. 433, L.R. 13 App. Cas. 523, 13 B.L.R. 312, 6 A. 231, 11 A. 27, 26 A. 497, 2 A. 718, 23 M. 593, 23 A. 285, R.

Suits of Civil nature.

Right of hereditary *joshi* to recover marriage fees from intruder—See CIV. PRO. CODE, No. 11, 3 N.L.R. 47.

Suits Valuation Act.

See ACT VII OF 1887.

Summons.

Service of, if essential for suit being contentious—See TRANSFER OF PROPERTY ACT, No. 16, 11 C.W.N. 561. (P.C.)

Sunday.

Disposal of suit on—Irregularity—See CIV. PRO. CODE, No. 290, A.W.N. (1907), 168.

Surety.

(1) *Suit to recover debt from surety—Admission by principal no evidence of amount of debt as against the surety.*

Held, that, in suit by a creditor to recover the amount of his debt from a person who had become surety for the debtor, an admission of the principal debtor as to the amount of the debt is not evidence as against the surety.

Ram Bhajan Lal v. Sheo Prasad, A.W.N. (1907), 293.

AIKMAN, J.

Reference :—17 Ch. D. 668, F.

(2) Decree passed against—and the judgment debtor—Application for execution against the judgment-debtor alone—Liability of—See LIMITATION ACT, No. 142, 8 Bom. L.R. 807 = 31 B. 50.

Surety.—(Concluded),

(3) Under S. 545, Civ. Pro. Code, for due performance of appellate decree, whether liable to be proceeded against in execution—See CIVIL PROCEDURE CODE, No. 146, 109 P.R. 1906=1 P.L.R. 1907.

(4) for performance of appellate decree, whether could be proceeded against by way of execution—See CIV. PRO. CODE, No. 269-b, 125 P.R. 1906=94 P.L.R. 1907.

(5) See PRINCIPAL and SURETY.

Survey Map.

(1) Topographical—, value of, as evidence in cases of boundary disputes—See EVIDENCE ACT, No. 9, 11 C.W.N. 230.

Syrian Christians.

Succession among—Applicability of Indian Succession Act—See Succession, No. 1, 22 T.L.R. 192.

“Talnati peon.”

—and chowkidar, distinction between See LEASE, No. 4, 6 C.L.J. 572.

Talukdar.

“Talukdar's estate”—Interpretation—whether it includes estate owned by talukdar as assignee of a mortgage debt—See ACT VI OF 1888 (TALUKDARI SETTLEMENT), No. 1, 9 Bom. L.R. 1122.

Taluqdari Settlement Act.

See ACT VI OF 1888 (BOMBAY).

Tarwad.

Improper alienation of Tarwad property of Karnavan—Suits by some junior members—Subsequent suit by succeeding Karnavan—Maintainability—See LIMITATION REGULATION, No. 4, 22 T.L.R. 157.

Tenancy.

(1) Creation of—Payment of rent and acceptance thereof, effect of, as to creation of tenancy—See LANDLORD and TENANT, No. 8, 5 C.L.J. 9.

(2) Whether reservation of annual rent makes tenancy one from year to year—See LANDLORD and TENANT, No. 21, 11 C.W.N. 1124.

Tenancy Act.

(1) See ACT XVI OF 1887 (PUNJAB).

(2) See ACT II OF 1901 (AGRA, N.W.P.).

(3) See ACT XI OF 1898 (C.P.).

(4) See ACT VIII OF 1885 (BENGAL).

Tender.

(1) *Tender of arrears of rent due—Tender, when legal and valid, effect of—Cheque, tender by, if proper—Waiver—Current coin—Interest, if chargeable after tender and before deposit in Court—Bengal Tenancy Act (VIII of 1885), Ss. 56 and 61—Deposit, effect of—Indian Coinage Act (XXIII of 1870)—Indian Paper Currency Act (XX of 1882)—Indian Coinage and Paper Currency Act (XXII of 1899).*

A tender to be valid, must be made in the current coin of the realm (a).

Under the Indian Coinage Act (XXIII of 1870), the Indian Paper Currency Act (XX of 1882) and the Indian Coinage and Paper Currency Act (XXII of 1899), legal tender includes coins and currency notes, and a tender by a cheque is not a legal tender.

When a tender is actually made, but in a currency different from that required by the law, for instance by a cheque on a banker, the objection to the form of the tender may be expressly or impliedly waived by the creditor, and he will be deemed to have waived the objection, if he rejects the tender on the ground of the insufficiency in amount, or on some other ground, without making any objection to the legality of the tender in point of quality (b).

A tender is not vitiated, because a receipt is asked (c). *Jagat Tarini Dasi v. Nabagopal Chaki*, 5 C.L.J. 270=34 C. 305.

MOOKERJEE and HOLMWOOD, JJ.

References :—(a) 5 Co. Rep. 114-a, 2 Cr. and Jer. 15=37 R.R. 623 and 12 Wallace (U.S.) 457, R. (b) 2 Cr. and Jer. 15=37 R.R. 623; 8 Dowling 442=59 R. R. 833; 5 Yerger 599=26 Am. Dec. 263; 1 H. and C. 764; 7 Wallace (U.S.), 447; and 4 C. 572, R. (c) 8 Dowling 442=59 R.R. 833; 8 M. and W. 298, R.

(2) *—of debt by debtor—Refusal by creditor—Subsequent suit for recovery of debt—Debt, or failing to pay amount in Court—Effect on interest.*

A person cannot be mulcted in interest after he has offered the amount due on a certain debt, if the amount has been wrongfully refused by the creditor.

But when the creditor brings his suit, it is the duty of the debtor on receiving intimation of the suit, to at once pay the money into Court.

Tender.—(Concluded).

Thus, where the debtor made a tender of the debt to the creditor which was wrongfully refused by him, and the creditor subsequently instituted a suit against the debtor, who, however, failed to pay the amount at once into Court, it was held that the debtor should not be liable for interest from the date of his tender until the date of the suit, but that interest from the date of the suit up to the date of realisation was to be awarded to the creditor.

This interest need not be at the contract rate. **Maung Shan v. Nyo Win**, 4 L.B.R. 108.

HARTNOLL, J.

Reference :—16 B. 141, *Diss.*

(3)—of rent—Refusal—Running of interest—Tender how kept good—See ACT VIII OF 1885 (TENANCY, BENGAL), No. 15, 11 C.W.N. 993.

Tenure.

(1) Under-tenure, whether *ipso facto* avoided by sale of the estate for arrears of revenue—See ACT XI OF 1859 (REVENUE SALE LAW), No. 6, 6 C.L.J. 472.

(2) See PERMANENT TENURE.

(3) See UNDER-TENURE.

Third party proceedings.

Object of—when leave should be granted—refusal to give directions on summons amounts to a dismissal of third party—See HIGH COURT RULES (BOMBAY), No. 1, 9 Bom. L.R. 374.

Time.

(1) Whether, is of the essence of contract, determination of—Relief against forfeiture—See EXECUTION-SALE, No. 3, 6 C.L.J. 176.

(2)—being essence of contract—Reasonable—See SPECIFIC PERFORMANCE, No. 1, 11 C.W.N. 946, (P.C.).

Title.

Question of proprietary title—by whom to be determined—Decision of Assistant Collector—Appeal—See JURISDICTION (CIVIL and REVENUE COURTS), No. 1, 4 A.L.J. 686.

Tolls.

(1) Breach of contract for—Measure of damages—See CONTRACT ACT, No. 35, 2 M.L. T. 194.

(2) Collection of unauthorised, in markets—Penalty—See ACT V OF 1884 (LOCAL BOARDS, MADRAS), No. 1, 17 M.L.J. 537.

Torts.

(1) *Joint tort-feasors or wrong-doers—Liability, joint and several—Limitation—Limitation Act (XV of 1877), Ss. 7 and 8—Hindu Law—Mitakshara—Joint family, Manager or karta of—Discharge, right to give a valid, for minor brother—Survivorship—Property inherited from maternal uncle—Certificated guardian, concurrence of—Mesne profits, suit for—Co-owners, right of—*

Per Brett, J.—The liability of joint wrong-doers is joint and several, and the person to whom the wrong is done is entitled to sue them jointly or severally at his choice. The factor that the claim is barred by limitation as against one will not in itself free the others from liability.

Nephews inheriting property of their maternal uncle take the property as co-owners without the benefit of survivorship, and they cannot be held, under the Mitakshara Law, to have formed, in respect of that property, a joint family separate from their father, of which the eldest brother, on attaining his majority, became the manager or *karta*; and the eldest brother has no power to grant a valid discharge in respect of debts due to his minor brother without the concurrence of the guardian, much less of a certificated guardian appointed by Court, of the property of such minor. When persons inheriting as co-owners have each of them distinct rights to a share, the concurrence of the others is not necessary to enable one of them to give a valid discharge for his special share (a).

Per Mookerjee, J.—Where several persons join in committing a tort, each is responsible for the injury sustained by their common act, and their liability is joint and several at the will of him to whom the wrong is done. He can sue any one or more of them at his election, and those who are sued cannot insist on having the others joined as defendants (b).

The rule that in actions for wrongs independent of contract, where several persons are entitled to sue in respect of a wrong done to them jointly, as for instance, in cases of injury to their joint property by trespass, conversion or negligence, they should in general all join as plaintiffs in the action, is not inflexible (c).

When two persons have been damaged by the same tortious act, and have, therefore, a joint cause of action, one is entitled to enforce his claim for damages, so far as he has been

Torts.—(Continued).

injuriously affected by the tort, although the claim of the other is barred by limitation (*d*).

In the case of a joint Mitakshara family, where a right is vested in all the members jointly, the managing member may, within the meaning of S. 8 of the Limitation Act (XV of 1877), give a discharge without the concurrence of the minor members of the family, and time may, therefore, run against all the members of the undivided family including the minor members thereof (*e*).

Where on the death of a maternal uncle, his estate devolves by inheritance on his sister's sons who at the time are undivided members of a Hindu family governed by the Mitakshara Law, they take it as co-owners or tenants in common without benefit of survivorship (*f*).

As a general rule, where a joint right to sue arises out of a tort, one or some of the holders of such right cannot give a discharge without the concurrence of the others, unless they are all partners or executors or members of a joint Hindu family, the manager of which has implied authority to bind all the members by a discharge given by him. The test to be applied is whether it is the intention of the parties that each of the persons in whose favour the obligation is created, is a creditor for the whole; if so, a payment to one liberates the debtors against all the creditors; if not, each is a creditor for his own share and cannot give a discharge for the whole obligation (*g*).

The powers of a guardian appointed by the Court to take care of a minor's property cannot be nullified, and the minor's elder brother cannot give a discharge as regards the minor's share without the concurrence of such guardian (*h*).

S. 8 of the Limitation Act applies only to cases where the joint creditors or claimants are persons whose substantive right is joint, that is, where more than one individual possesses the same identical substantive right; the section does not apply to persons whose rights are distinct and different, but who are permitted to enforce such separate rights by one judicial process (*i*). **Harihar Pershad v. Bholi Pershad**, 6 C.L.J. 388.

BRETT and MOOKERJEE, JJ.

References:—(*a*) 27 M. 300, R. (*b*) (1847) 1 Exch. 131 (140); 74 R.R. 615; (1841) Car and Marsh 93 (3); (1802) Y.B. 30 Edw. 1 (Horwood) 106; (1794) 5 T.R. 649, 2 R.R. 684; (1815) 6 Taunton 29; 16 R.R. 563; (1817) 6 M. and S.

Torts.—(Continued).

385; 18 R.R. 413; (1838) 8 A. and E. 963; 47 R. 802; (1887) 12 P.D. 58 (93); (1866) 3 Wallace 1; (1836) 2 Sumner 338; (1806) 1 Johnson 290. (1878) 3 C. 353, R. (*c*) 25 C. 285; 2 C.L.J. 496; 1 Q.B. 665 R. (*d*) 25 C. 285; 5 East 407; 6 T.R. 766; 7 T.R. 279; 4 Car and Payne 152, R. (*e*) 4 A.512. 16 M. 436, 58 P.R. 1882, R. (*f*) 27 M. 300, R. 29 I.A. 156 and 25 M. 678, *Expl.* and D. (*g*) 7 A. 313, 2 Ch. 160, 5 C.L.J. 270 = 34 C. 305 (321); 25 A. 155; 1 N.L.R. 24, R. (*h*) (1888) Bom. P.J. 141 and 14 C. 50, R. (*i*) 28 M. 479; 14 C. 50 and 25 A. 155, R.

(2) *Abusive language—No special damage—Not an actionable wrong—*

The mere use of abusive and insulting language, apart from defamation, is not actionable, irrespective of any special damage. The remedy of the person aggrieved in the majority of such cases lies in the Criminal Courts. **Maung Kyaw v. Tha Dun U**, 4 L.B.R. 50.

HARTNOLL, J.

References:—26 C. 653, F. 15 Bom. L.R. 161, R.

(3) *Servant delegating his authority—Damage caused by act of the delegate—Liability of master.*

Ordinarily a master is not liable for the negligent acts of his servant, except when the servant is acting within the scope of his authority. So, where a driver of a tonga entrusted it to a boy, having no authority so to delegate his powers, and having no emergency which necessitated such a delegation, and the tonga, owing to the boy's negligence, caused damage to the plaintiff's horse, *held* that the master is not liable for the boy's negligence, the case being governed by the rule embodied in S. 190 of the Contract Act, that a servant cannot ordinarily delegate his authority.

Obiter:—"There is nothing to prevent prospective damages being assessed in an action on tort". **Sardar Khan v. W. G. Gilmore**, 3 N.L.R. 101.

DRAKE-BROCKMAN, J. C.

References:—64 L.J.Q.B. 474, F.; 66 L.J.Q. B. 122, D.

(4) *Injuria sine damno—Failure to prove special damage.*

If there be a right, and if there be an infringement of that right, it is not necessary to show that there has been any subsequent injury; and if the plaintiff's undoubted right

Torts.—(Concluded).

has been invaded, he would be entitled to a remedy, whether any damage has accrued to him or not.

The principle ordinarily applied to actions of tort is that the plaintiff is never precluded from recovering ordinary damages, by reason of his failing to prove the special damage he has laid, unless a special damage is the gist of the action. **Nga Myat Hmwe v. Nga Yi**, U.B.R. (1906), Tort, 9.

SHAW, J. C.

References:—10 M.I.A. 563, 11 M.I.A. 7, 6 I.A. 190, 11 W.R. 143, 25 W.R. 547, 20 C. 1, U.B.R. (1897-1901), II, 231, R.

Town and Village Lands Act (Lower Burma).

See ACT IV of 1898 (L.B.).

Trade Marks.

(1) *Infringement of—Colourable imitation misleading the public—Ignorant and unwary up-country purchaser—Likelihood of deception.*

A trader has a right to use any marks he pleases, so long as they are not calculated to mislead the public or infringe anybody's trade-mark.

In order to ascertain whether a trade-mark is calculated to deceive purchasers into the belief that they are buying goods of one manufacturer, when they are not his goods, the Court may look at the two marks in question, with its own power of forming an opinion, accompanied by the evidence given in the case.

In India, if the goods are despatched and sold up-country, the Court must also consider if the marks are calculated to deceive the incautious, ignorant or unwary up-country purchaser.

The question in these cases is, not whether the mark complained of has deceived, but whether it is calculated to deceive.

Per SALE, J.—A counterfeit trade-mark may be defined as a trade-mark, which is either designed and used with the intention of deceiving, or which, by reason of its resemblance to another pre-existing and already established mark, is calculated to deceive, apart from any dishonest intention.

It lies upon the plaintiff to establish affirmatively that the marks of resemblance were accidental and not designed.

If the plaintiff, having the opportunity, deliberately abstains from showing that the resem-

Trade marks.—(Concluded).

blance adopted by him was accidental and innocent, it necessarily follows that it was the result and outcome of deliberate design and intention. If the Court, on the facts before it must presume that the resemblance is not accidental, but intentional and designed, then, the imitation must have been designed with the object of deceiving. If the object was to deceive, then, the Court will presume as against the wrong-doer, that the means employed to cause deception were calculated to effect that purpose. This is the effect of the ruling in *John Smidt v. se Reddaway* (a).

It is only if the fraudulent design is negatived that it becomes material to enquire whether the resemblance between the two combinations of marks was calculated to deceive.

Evidence of experts or men in the trade cannot be given to show whether or not a combination is such as is calculated to deceive the purchaser. It is a question entirely for the Judge. Evidence of facts, which may assist the Judge to come to a conclusion whether one mark is a colourable imitation of another, may be given (b).

In a suit for slander of title, malice in law is not sufficient, *i. e.*, it is not sufficient to show that the mark or combination of the plaintiff was falsely charged as a colourable imitation, without legal justification or excuse. Malice in fact must be proved. **Nemi Chand v. C. W. Wallace**. 11 C.W.N. 537 = 34 C. 495.

MACLEAN, C.J., GEIDT and WOODROFFE, JJ.

References:—(a) 32 C. 401, R. (b) L.R. (1899) App. Cas. 83, F.

As to the old practice—L.R. 7, App. Cas. 216 (1882), R.

Transfer.

Plea in defence that transfer is invalid whether avails in subsequent suit by defendant—See LIMITATION ACT, No. 46, 17 M.L.J. 220.

Transfer of district.

(1)—from one Province to another—Jurisdiction to hear appeal—See JURISDICTION, (GENERAL), No. 5, 5 C.L.J. 550.

(2) Jurisdiction to hear second appeals from transferred area—See APPEAL (SECOND APPEAL), No. 1, 11 C.W.N. 956.

Transfer of Property Act.

(1) *Ss. 3 & 6—Benefit of an executed contract if actionable claim—Insolvent Act (11 and 12 Vict., C 21), S 7—Benefit of executory*

Transfer of Property Act.—(Continued).

contract, if can vest in Official Assignee under S. 7.

The benefit of an executory contract is an actionable claim within the meaning of S. 3 of the Transfer of Property Act. It is such property as would vest in the Official Assignee under S. 7 of the Indian Insolvent Act. **Jaffer Meher Ali v. The Budge Budge Jute Mills and Co.**, 11 C.W.N. 566=34 C. 289 (on appeal from 10 C.W.N. 755=33 C. 702).

MACLEN, C.J., HARRINGTON and GEIDT, JJ.

- (2) Ss. 3, & 69—*Notice, constructive—Knowledge of solicitor acquired prior to employment—English mortgage—Power of sale, sale under—Irregularity—Condition of sale—Depreciatory condition—Purchase with notice—Purchaser's title—Trying Court's appreciation of evidence—Interference on appeal—Plaint—Amendment—Specific Relief Act (I of 1877), S. 42.*

Knowledge of an agent, not acquired in the matter for which he was agent, cannot be imputed to a principal and used to upset a transaction of a date before the agency commenced.

A sale, purported to be held under a power of sale contained in an English mortgage, provided that "the purchaser shall not be bound to see or inquire whether default has been made or otherwise, as to the necessity or expediency of the sale, or that the sale is otherwise improper or irregular," and that any such irregularity should not invalidate the purchaser's title, and that the "remedy of the mortgagor shall be in damages only." It was found, however, by the Court of first instance, upon a careful consideration of the evidence which was both voluminous and conflicting, that the mortgagees or their agents so conducted themselves with reference to the sale that would be bidders as it were induced to leave, and that the purchaser had notice of these circumstances within the meaning of S. 3 of the Transfer of Property Act.

Held, that the case was peculiarly one, in which the Judicial Committee would be reluctant to reject the finding of the Judge who tried the case, provided there was sufficient evidence to support his finding, and that the sale was not a *bona fide* auction sale, and the purchaser having purchased with notice, it should be set aside. **Chalidas Lalooobhai v. Dayal Mowji**, 11 C.W.N. 1109 (P.C.)=9 Bom. L.R. 1062=

Transfer of Property Act.—(Continued).

17 M.L.J. 465=4 A.L.J. 750=6 C.L.J. 674=2 M.L.T. 394=31 B. 566.

LORD MACNAGHTEN, LORD DAVEY, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

- (3) S. 6—*Reversionary interest, transfer of, invalid—Unregistered document, validity of, where value of property not specified in the deed, but exceeds Rs. 100.*

Held, that the transfer of a merely reversionary interest is invalid under S. 6 of the Transfer of Property Act (a).

Held, further, that a document by which property exceeding Rs. 100 in value is transferred is invalid if not registered, although the value of the property is not specified in the deed. **Sri Govind v. Balbhaddar**, 10 O.C. 277.

GREEVAN, A.J.C.

References:—(a) 29 C. 355 (362), 21 A. 71 (P.C.), 24 A. 94 (107 and 108), R.

- (4) S. 6—*Agreement between divided brothers as regards estate of a deceased divided brother—Widow of deceased brother not a party to the agreement—Validity of the agreement—See HINDU LAW (REVERSIONERS), No. 3, 17 M.L.J. 505.*

(4-a) S. 6—*See No. 1, supra.*

- (5) S. 6 (a) *Relinquishment by reversioners—See HINDU LAW (ADOPTION), No. 3, 2 M.L.T. 184.*

- (6) S. 6 (a)—*Spes successionis—Transferability and releasability of—See MAHOMEDAN LAW (SUCCESSION), No. 2, 8 Bom. L.R. 781=31 B. 165.*

- (7) S. 6, cl. (d)—*Sale of books—Jajmani Bahis—Right to act as hereditary guide, transfer of.*

The sale of *Jajmani Bahis* (books in which lists are kept of pilgrims who have visited the place in past years) is not forbidden by cl. (d) of S. 6 of the Transfer of Property Act. A sale, however, of these books will not convey to the purchaser any right of the judgment-debtor to act as the hereditary guide of the pilgrims mentioned therein. **Gopi Nath v. Jhandu**, 4 A.L.J. 712=A.W.N. (1907), 282.

BANERJI and AIKMAN, JJ.

- (8) Ss. 6 and 67—*Mortgage of impartible zamindari by holder and members of his family standing in the line of succession to the*

Transfer of Property Act.—(Continued).

zamindrai—Suit for sale of mortgaged property and appointing receiver pending sale—Consent decree—Spes successionis—Civ. Pro., Code, Ss. 274, 503—Court's power to appoint receiver.

In a suit instituted under S. 67, Transfer of Property Act, for sale of the mortgaged property against 5 defendants, the then zamindar of Ammayanaikanor and 4 members of his family, who stood in the line of succession to the zamindari, the consent decree, which was sought to be executed, provided that the decree-debt should be paid off by instalments, that, in default, defendants Nos. 1 to 5 shall pay the balance outstanding, that the mortgaged property, including the zamindari then in possession of the first defendant and to which the other defendants are entitled, shall stand liable, and that, in default, the plaintiff shall be at liberty to proceed against, and realise, the said amount with interest as provided in the decree by precept of Court from defendants Nos. 1 to 5 and the mortgaged properties. The decree, further, provided that, if the *razinama* amount should not be paid off in the life-time of the first defendant and he should be succeeded by a person, who was not a party to the suit, and such successor should object to pay the balance, the balance with interest should be paid by whichever of defendants Nos. 2 to 5 should succeed to the zamindari, at whatever period, as soon as he should so succeed, and that, in default, the plaintiff should be at liberty to proceed against the remaining defendants in accordance with law and that, until the whole amount is to be realised, the mortgaged properties and defendants Nos. 1 to 5 should stand liable. The first defendant was the zamindar then in possession, but the member of the family next in succession, who subsequently succeeded, had not joined in the mortgage and was not a party to the above suit. The second defendant succeeded the first defendant. The decree-holder filed an execution petition against defendants 2 to 5 in the suit praying for the sale of the mortgaged property and the appointment of a receiver pending sale. *Held*, that the provisions as to the event of the *razinama* amount not being paid in the life-time of the first defendant, were inserted with the object of keeping alive the right to execute the decree against defendants Nos. 2 to 5, in the event of none of them succeeding until further execution would, but for such provisions, have become impossible; and that the words

Transfer of Property Act.—(Continued).

"realise by precept of Court from the mortgaged properties" include a power to sell the zamindari, so far as it might lawfully be sold and, therefore, clearly a power to sell in default the life-interest of the first defendant, the zamindar then in possession. As to the succeeding life-interests of the other defendants in the zamindari, it was held that the decree does not give any power to sell such life-interests until they take effect in possession; that the interests, which defendants Nos. 2 to 5 have purported to transfer, would be in the nature of a mere chance of succession within the prohibition in S. 6 (a) of the Transfer of Property Act; and that, as S. 6 (a) renders such transfers unlawful on grounds of public policy, the Courts cannot allow them to be effected by means of consent decrees (a).

Held, therefore, that the order of the lower Court directing the sale of the zamindari should be set aside; and that, as the second defendant had the advantage of the advances under the said mortgage, which were made for protecting his right to succession, he should be made personally liable on the decree and that the decree-holder should, therefore, be allowed to amend the execution petition by inserting a prayer for execution against the second defendant, personally, and that the receiver appointed by the lower Court should be retained.

Where a receiver has been validly appointed on the ground that the property was the subject-matter of the suit, and it, afterwards, turns out on appeal that the decree only operates against the defendants, personally, the appellate Court has jurisdiction to maintain the receiver as a method of realising the decree amount from the judgment-debtor personally (b). **Ramasami Naik v. Ramasawmi Chetty**, 2 M.L.T. 167 = 17 M.L.J. 201 = 30 M. 255.

BENSON and WALLIS, JJ.

References:—(a) 8 Bom. L.R. 781, *appr.*; 18 M. 291, 10 A. 272, (1899) A.C. 114, 8 Bom. L.R. 813, 26 M. 81, 8 I.A. 123, 11 B. 537, 28 M. 355, R. (b) 8 W.R. 10, 18 C. 188, 18 M. 437, 25 M. 537, 28 M. 473, R.

(9) Ss. 6 and 135—*Actionable claim—Notice necessary.*

Where the following endorsements were separately made on the back of two contracts:—(a) "As to the whole of my right (and) interest in this contract, I have sold the same to..."—(b) "I have sold the whole of my right and

Transfer of Property Act.—(Continued).

interest in this contract and (in) the goods mentioned therein to. . ."

Held, that what was transferred thereby was property; that none of the exceptions to S. 6 of the Transfer of Property Act applied; and that the subject of transfer was an actionable claim, requiring notice, under S. 135 of the Transfer of Property Act, on the part of the transferee, to prevent any dealings prejudicial to himself.

Hunsraj Morarji v. Nathoo Gangaram,
9 Bom. L.R. 836.

JENKINS, C.J., and PRATT, J.

(10) *Ss. 8, 130, and 135 (before amendment by Act VI of 1900)—Meaning of actionable claim—Assignment of lessor's right—Suit by assignee against lessee for rent—Prior mortgage of leased property to lessee—Mortgagee's (lessee) right to set off mortgage amount against lease amount—Trust deed by mortgagor (lessor) in favour of his son—Principal and surety—Waiver of right to set off—Estoppel by conduct.*

Under S. 130 of Act IV of 1882, before its amendment by Act VI of 1900, a claim has been held to be not actionable unless it is "a claim in respect of a cause of action which has already matured, and which, subject to procedure, may be enforced by suit" (a). The words "likely to become necessary" in S. 130 seem to point rather to a case in which, after the right of action has accrued, litigation is impending, than to a remote possibility of a suit at some future time, when the right to sue shall have actually matured.

The word "debt" in S. 8, cl. (5) is not used in the widest sense, for, if so, it would cover the case of judgment debt which is excepted from the operation of S. 135. The word should be confined to such debts as fall within the general category of actionable claims.

Where a person leased out his property for a monthly allowance, and then assigned his right to receive the allowance, and thereupon the assignee sued the lessees for the amount so due, but the lessees having previously taken a mortgage of the same property, claimed to set off the amount due to them from the lessor in respect of the mortgage on the date of the assignment, *held* that the set-off must be allowed, unless the right has been lost by waiver, estoppel, by conduct, etc.

But as the mortgagor had, by a deed of trust, executed subsequent to the mortgage, transferred all his property to the trustee in trust

Transfer of Property Act.—(Continued).

for his son after the payment of all his debts including the mortgage debt, and as the mortgagee had, by a "postponement deed" executed by him, arranged with the trustee to place himself in the position of a second mortgagee, with reference to certain other creditors of the mortgagor, and as the mortgagor was a consenting party to the arrangement, it must be held, that neither the mortgagor nor the persons claiming through him, can plead that the above action of the mortgagee disentitled him from relying on the personal remedy against the mortgagor, given to him by the mortgage.

The trustee and the mortgagor, in the above case, did not occupy the position of a principal debtor and surety respectively, and the fact that the mortgagee had granted time to the trustee did not entail loss of the mortgagor's personal liability to the mortgagee (b).

The mortgagor's son had sued to set aside the lease on the ground that it was obtained by undue influence and fraud. The lessees contended that, if that suit should succeed, they would be entitled to a refund of the consideration paid for it by way of the monthly payments and that as that would be an equity to which the lessor would be subject, his assignee would also be bound by it, *held* that under Ss. 88 and 41, Specific Relief Act, the award of compensation and the amount thereof, in the event of the lease being so set aside, will depend upon circumstances as they shall exist at the time of the cancellation and that, therefore, any such possible equity in the pending action cannot be relied upon as a defence or even a temporary bar to the present action by the assignee.

Arunachellam Chetty v. Subramania Chetty, 17 M.L.J. 87 = 30 M. 235.

SUBRAHMANIA AYYAR and BENSON, JJ.

References:—(a) 25 M. 610, R., 18 A. 265, Appr. (b) 27 Beav. 349, 28 Beav. 341, I. P. C. 50, 39 Ch. D. 636, 42 Ch. D. 610, R.

(11) S. 10, effect of—Restraint upon anticipation—See ACT III of 1874 (MARRIED WOMEN'S PROPERTY), No. 1, 17 M.L.J. 368.

(12) *Ss. 10, 12, and 126—Gift subject to a power of revocation—Gift not repugnant to the original transfer.*

Where the defendants made a gift of certain property to the plaintiffs on the condition, that the land would be liable to be taken back in the event of the plaintiffs transferring it, *held* that the gift was a gift subject to a power of

Transfer of Property Act.—(Continued).

revocation, and was not repugnant to the original transfer, under Ss. 10 and 12 of the Transfer of Property Act. The plaintiffs, therefore, were not the proprietors of the land. **Makund Prasad v. Rajrup Singh**, 4 A.L.J. 708 = A.W.N. (1907), 278.

BANERJI and AIKMAN, JJ.

(12-a) S. 12—See No. 12, *supra*.

(13) S. 41—*Ostensible owner—Benamidar—Purchase from the benamidar—Purchase for value without notice, limits of the doctrine of.*

No purchaser can protect himself against the claim of a real owner, merely by saying that he had no notice of the real owner's title. A purchaser is not justified in shutting his eyes and buying recklessly from a vendor without any inquiry, and resisting the real owner, on the ground that the real owner did not come forward. He must make some reasonable inquiry into title, before he can take advantage of the doctrine of purchaser for value without notice, which could protect him against an undiscoverable and hidden equitable interest. When he has taken reasonable care to ascertain his vendor's title, then, no doubt, if there is an equitable interest of which he could, by such reasonable care, discover no trace, the doctrine of purchaser for value without notice may stand him in good stead.

Reasonable care is to be expected from every one, who claims to have purchased free from a really existing right, equitable or legal, and when the purchaser has failed to exercise it, he cannot claim that the real owner should be called on to prove his good faith and innocence instead. **Zungabai Bhawani v. Bhawani Appaji**, 9 Bom. L.P. 388.

BATTY and PRATT, JJ.

(14) S. 41—*Consent by guardian of—Minor owners—Minors not bound—Guardian not 'person interested.'*

Where a transferee from the guardian of certain minor owners is in possession of property with the consent of the guardian, even if that consent is given expressly, it would not be a consent, which would pass the ownership to the purchaser within the meaning of S. 41 of the Transfer of Property Act, inasmuch as the guardian giving the consent is, not a person personally interested in the property.

Where the property is the property of minors and another person is giving himself out to be

Transfer of Property Act.—(Continued).

the owner, the persons interested could not be said to have given their consent so as to be bound by any transfers which the ostensible owner makes. **Dambar Singh v. Jawitri Kunwar**, 4 A.L.J. 181 = A.W.N. (1907), 72 = 29 A. 292.

STANLEY, C.J., and BURKITT, J.

(15) S. 51—*Application of, to Mahomedans—Sale by de facto guardian of Mahomedan minor—Effect on the minor.*

The sale by the mother, though made by her as *de facto* guardian of the minor, the parties being Mahomedans, is not binding on the minor (a).

There is no rule of Mahomedan Law, which precludes persons from claiming the benefit of the principle of equity embodied in S. 51. S. 51 does not cease to apply, on the ground that Chapter II of the Act is not to be deemed to affect any rule of Mahomedan Law. A party, who acts under a mistake of law, may still act in good faith within the meaning of the section, and the question, whether the transferor of immoveable property believes in good faith that he is absolutely entitled thereto, is a question of fact. **Durgooi Row v. Fakir Sahib**, 1 M.L.T. 433 = 17 M.L.J. 9 = 90 M. 197.

WHITE, C. J., and SUBRAHMANYA AIYAR, J.

References :—(a) 26 M. 734; 29 C. 473; 20 B 199, *Appr.* and *F.*

(16) S. 52—*Lis pendens—Contentions suit, meaning of—Service of summons if essential—Redemption, right of—Extinction of right on confirmation of sale in execution of mortgage decree.*

It is erroneous to hold that a suit, contentious in its origin and nature, is not contentious within the meaning of S. 52 of the Transfer of Property Act, until a summons is served on the opposite party.

The true basis of the doctrine of *lis pendens* indicated (a).

After a suit had been instituted to enforce a mortgage, but, before summons was served, the mortgagor granted a second mortgage. Pending this suit, the second mortgagee sued on his mortgage, without making the first mortgagee a party, and had the property sold. The purchaser got ample opportunity to redeem the first mortgage, whilst the sale proceedings in execution of the decree obtained by the first

Transfer of Property Act.—(Continued).

mortgagee were still in progress, but never offered to do so.

Held that the purchaser's right to redeem the property was extinguished, when the sale in execution of the first mortgagee's decree was confirmed. **Falyaz Husain Khan v. Munshi Prag Narain**, 11 C.W.N. 561 (P.C.)=4 A.L.J. 344=5 C.L.J. 563=17 M.L.J. 263=9 Bom. L.R. 656=2 M.L.T. 191=28 A. 389.

• LORD MACNAGHTEN, LORD DAVEY, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

Reference:—(a) 1 D. Gex. and J. 566 (1857), *relied on*.

(17) S. 52—*Lis pendens*—*Alienation after the institution of suit but before service of summons*—*Contentious suit*—*Active prosecution of the suit*.

An alienation of property, after the institution of the suit, but before the summons could be served upon the defendant, is affected by the rule of *lis pendens*.

Per JENKINS, C.J.—S. 52 imposes two conditions, (a) the existence of a contentious suit, and (b) that the transfer should be during its active prosecution in a Court of the kind described in the section.

The word "contentious" in S. 52 is used to introduce into the section a condition that the suit must be real, and not collusive. It is impossible to think that it indicates a quality that cannot belong to a suit until service of summons, or that a suit, in other respects contentious, is not so, because the plaintiff may have been unable to serve the summons on the defendant.

Semble.—It is worthy of consideration whether the risk of the hardship to the purchaser could be diminished by requiring a *lis pendens* to be registered, before it can bind transferees for value.

Per BEAMAN, J.—The word "contentious" in S. 52 qualifies the whole doctrine of *lis pendens*, that is to say, there can be no *lis pendens* without a contentious suit. The expression, "during the active prosecution," in the section, subject to that qualification, defines the point of time, at which the rule comes into operation. The former conditions the existence of *lis pendens*, the latter fixes the commencement and continuance of its existence.

From the moment a suit of any sort whatever, except only collusive suits, is filed, it is

Transfer of Property Act.—(Continued).

potentially contentious. And for the purpose of bringing the rule of *lis pendens* into operation, there must be an active prosecution of that suit. What is or what is not an active prosecution must be, from the very nature of the terms employed, always in some degree a question of fact. **Krishnappa Venkaraddi v. Shiwappa Timaraddi**, 9 Bom. L.R. 590=31 B. 393.

JENKINS, C.J., and BEAMAN, J.

(18) S. 52—*Lis pendens*—*Conveyance pending a suit*—*Effect of alienation*.

The doctrine of *lis pendens* is not based on the equitable doctrine of notice, but on the ground that it is necessary to the administration of justice that the decision of the Court in a suit should be binding, not only on the litigant parties, but on those who derived title from them *pendente lite*, whether with notice of the suit or not.

The effect of the doctrine of *lis pendens* is, not to annul the conveyance made in contravention of it, but only to render it subservient to the rights of the parties to the litigation.

The doctrine is not applied so as to affect the title of the alienee of a defendant, by virtue of a claim, not interfering with the title of the plaintiff in the pending litigation. **Nathaji Anandray Patil v. Nana Sarjerao Patil**, 9 Bom. L.R. 1173.

RUSSELL and KNIGHT, JJ.

(19) S. 52—Application for leave to sue in *forma pauperis*—Mortgage before application was granted—Contentions suit or proceeding—See HINDU LAW (WIDOW) No. 18, 4 A.L.J. 795.

(20) Ss. 52, 86 and 87—*lis pendens*—*decree nisi for foreclosure*—*private sale of property before final decree*—*effect of*.

A decree for foreclosure under section 86 of the Act is a decree *nisi* and not a final, decree, and the suit in which it is passed does not terminate until an order absolute for foreclosure is made under S. 87. A purchase made before the passing of the order absolute is a purchase *pendente lite* and the purchaser is bound by the order absolute for foreclosure, although he is not made party to it (a). **Parasotam v. Chheda Lal**, 3 A.L.J. 675=A.W.N. (1906), 283=29 A. 76.

BANERJI, J.

References:—(a) 23 A. 931 and 22 B. 939, *R.* and *F.* 1 A.L.J. 288, *Distd.*

(21) S. 53—*Fraudulent transfer of moveable property to the prejudice of creditors*—*Good*.

Transfer of Property Act.—(Continued).

faith and consideration—Consideration in part discharge of debts.

Where property sought to be assigned is not immoveable property, S. 53 has no direct application, and the question must be decided by a reference to general principles of justice, equity and good conscience. Each case must depend upon its own circumstances, and in all the question is one of fact, whether the transaction is *bona fide* or is a contrivance to defraud creditors (a).

It may be stated, generally, that a deed is void against creditors, when the debtor is in a state of insolvency or when the effect of the deed is to leave the debtor without the means of paying his present debts. If this is the condition of the debtor or the consequence of his act, it is not sufficient to render a deed valid that it should be made upon good consideration; for a good consideration does not suffice, if it be not also *bona fide* (b).

There is nothing in S. 53 to prevent a creditor being given preference, provided nothing more is done by the transaction, either with reference to the transferor or transferee, so as to injuriously affect the creditors of the former.

But, if the transaction is entirely invalid as against the creditors, it cannot be allowed to be treated as partly valid, even to the extent to which the consideration for the deed of assignment went in discharge of the executant's creditors. It is open to these satisfied creditors to protect themselves, by discharging the claims of the executant's other creditors, at whose instance the transaction is voidable. **Chidambaram Chettiar v. Sami Iyer alias Arunachalamaiyar**, 16 M.L.J. 427=1 M.L.T. 351=90 M. 6.

(22) *S. 53—Fraudulent transfers—Barred debt forming part of consideration for transfer—Evidence of fraud—Onus of proof of fraud.*

The mere fact that one creditor is preferred to another does not, in itself, render the transaction in favour of the preferred creditor voidable under the section. It is for the Courts to say, on the evidence taken as a whole, whether it is sufficient to warrant the inference that the transfer was made, with the intent to defeat or delay creditors; and such an intent must be established affirmatively, by the person suing for the declaration that a sale-deed is invalid as against him, as being in fraud of the creditors.

Transfer of Property Act.—(Continued).

The fact that a barred or irrecoverable debt is set up as part of the consideration for the transfer is, no doubt, an element in the case, which must be taken into consideration. It is some evidence of fraud, but a finding of that sort is not so strongly suggestive of a fraudulent intent, as a finding that the debts, set up as part of the consideration, have never existed and was fictitious.

The difference between the amount of the debt found due and the value of the property at the date of the sale, must not only be substantial, but it must be so gross as necessarily to indicate that the transferor, when he executed the sale-deed, did so, with the knowledge that the value of the property was greatly in excess of the amount of the debt. **Hanifa Bibi Saheba v. Punnamma**, 17 M.L.J. 11.

WHITE, C.J. and WALLIS, J.

Reference:—23 M. 188, D.

(23) *S. 53—Conveyance in fraud of creditors—Suit to declare same void—Parties—Maintainability—Transfer in favour of creditors not void merely because it gives preference—Creditor's participation in fraud—"Good faith"—Interpretation of Statute—Statutes in pari materia—Stat. 13, Eliz. Chap. 5, S. 6—"Bona fide."*

A suit to set aside a conveyance alleged to be fraudulent within the meaning of S. 53 of the Transfer of Property Act must be brought by or on behalf of all the creditors (a).

Where a debtor purported to convey his properties for adequate consideration, for the purpose of paying off some only of his creditors, and it was proved that the debts were genuine debts and were all discharged out of the consideration for the conveyance,

held—that the transfer was not voidable under S. 53 of the Transfer of Property Act.

It is not enough, in order to support a conveyance or transfer as against creditors, that it be made for valuable consideration. It must also be *bona fide*.

A mere fraudulent intent on the part of the grantor alone will not invalidate the transfer, if it is for valuable consideration and there is no want of good faith on the part of the grantee.

A creditor to whom such a transfer is made, however, occupies a more favoured position than a person who purchases for present consideration. For, in the absence of a law of bankruptcy, a preferential transfer of property

Transfer of Property Act.—(Continued).

to one creditor cannot be declared fraudulent as to other creditors, although the debtor, in making it, intended to defeat their claims, and the creditor had knowledge of such intention. If the only purpose of the creditor is to secure his debt, and the property is not worth materially more than the amount of the debt, the transaction is not fraudulent. If, however, the transfer is not in reality a preference of an actual debt, but is a mere colourable device to place the debtor's property beyond the reach of his creditors, or if the transaction extends beyond the necessary purpose of a mere preference, so as to secure to the debtor some benefit or advantage, or to unnecessarily hinder and delay other creditors, the transfer is fraudulent.

Stat. 13, Eliz. Ch. 5, S. 6 and the third paragraph of S. 53 of the Transfer of Property Act compared, and held that reference to English authorities bearing on the interpretation of the expression "*bona fide*" in the former enactment, for the purpose of interpreting the expression "good faith" in the latter, is not only legitimate but essential.

The English and Indian authorities reviewed.
Lala Hakim Lal v. Mooshabar Sahoo, 11 C.W.N. 889=6 C.L.J. 410=34 C. 999.

MOOKERJEE, and HOLMWOOD, JJ.

References:—(a) 16 B. 1; 27 B. 146; 9 C.W.N. 225=32 I.A. 1, 11.

(24) S. 54—Transfer of immoveable property valued less than Rs. 100—Delivery of possession—Transferee in possession from before date of sale.

Where immoveable property valued at less than Rs. 100 is sold, such sale must be either by a registered instrument or by delivery of possession of property. Where there is no delivery, because the vendee has been in possession of the property from before the date of sale, and there is no registered instrument, the sale is invalid. **Sibendra Pada Banerji v. Secretary of State for India in Council**, 5 C.L.J. 390=34 C. 207.

MOOKERJEE and HOLMWOOD, JJ.

Reference:—22 C. 179, D.

(25) S. 54, not applicable to Berar—Necessity for registration of sale deed—Sale of equity of redemption.—See SALE, No. 2, 3 N.L.R. 72.

(26) S. 55, Cl. (1) (b), (4) (b)—Nature of vendor's lien—Vendor's possession whether adverse—Onus of proof.

Transfer of Property Act.—(Continued).

Both in England and in India, under the Transfer of Property Act, the vendor's lien for unpaid purchase money is non-possessory. He is only entitled to retain the title-deeds and to a charge for the unpaid purchase money.

Even assuming that the onus of showing that the possession of unpaid vendor was not adverse rests upon the vendee, held, that, in that particular case, the onus was sufficiently discharged by the extract from the village accounts, which showed that, after the conveyance, the putta was transferred in the name of the vendee (a). **Yelayuda Chetty v. Govindasamy Naicker**, 17 M.L.J. 450=30 M. 524=3 M.L.T. 10.

WHITE, C. J., and WALLIS, J.

Reference:—(a) 11 C. 239, R.

(27) S. 55 (2)—Application of principle of, to sales in Burma—See SALE, No. 1, U.B.R. (1907), Evidence, 1.

(28) Ss. 55 (4) (b), 57 (a)—Application of, to the Punjab—See INSOLVENCY, No. 3, 148 P.R. 1907.

(29) S. 55 (5) (d), applicability of principle of, to Court sales—Sale of property subject to charge for maintenance—See CONTRACT ACT, No. 30, 17 M.L.J. 250.

(30) Ss. 55 and 59—Assignment of mortgage right pending suit on mortgage—Insufficient attestation of the mortgage deed—Discovery of this defect after assignment—Suit by assignee for refund of purchase money—Specially covenant protecting assignor from liability—Effect of.

A mortgagee assigned all his rights under the mortgage bond, after instituting a suit on the bond against the mortgagor. At the time of assignment, both parties were ignorant of the fact that the bond was attested by only one witness, contrary to S. 59. The assignee specially covenanted that the assignor (mortgagee) shall not be liable for any defect in the claim transferred and assigned or responsible for any sum of money that may not be recovered by the assignee. Subsequently, the above defect was discovered and the assignee brought a suit for declaration that the assignment was void and for a refund of the consideration paid by him to the assignor for the assignment.

Held, that the assignment was not void, and that the assignee was not entitled to the refund, in view of the special covenant referred to above. Assuming that the technical informality in the mortgage deed would constitute a

Transfer of Property Act. — (Continued).

breach of the covenant, by the vendor, under S. 55, the special covenant, upon which the vendor (mortgagee) relies, negatives the statutory covenant that the interest which the seller professed to transfer subsisted. In other words, there is a contract to the contrary, within the meaning of S. 55. Non-compliance with the rule laid down in S. 59, as to attestation by witnesses, does not render the personal covenant to pay the debt void. With reference to bonds for money, which purported also to mortgage immoveable property for the debts, but which were not registered as required by the Registration Act, the non-registration has been held not to affect the validity of the contract to pay the debt, and there is no real difference between the two cases.

Whether a particular affirmation of the quality of a specific thing sold is conditional, and the transaction is to be null, if the affirmation is incorrect, is only a question of the intention of the parties to be decided by the circumstances of each case. Where, in addition to the affirmation, there is a separate warranty also in the agreement, the existence of such separate warranty shows that the matter of the warranty is not a condition or essential part of the contract, but that the intention of the parties was to transfer the property in the subject of the sale at all events. In such cases, if the sale is made in good faith and there is a breach of the warranty, a purchaser is entitled only to compensation for the breach of the warranty and the sale is not even voidable. The present is an *a fortiori* case, inasmuch as the vendee (assignee) has chosen to contract to take the claim with all its defects, and to hold the vendor not responsible for the consequences. **Sadu Kavaur v. Tadepally Basaviah**, 1 M.L.T. 416 = 17 M.L.J. 197 = 30 M. 284.

WHITE, C. J., and SUBRAHMANYA AYYAR, J.

References :—26 C. 78, *Appr.* 18 M. 29, not approved, 12 B. 7. *Dist.*

(31) Ch. IV—Mortgage by mortgagee of his rights as such, but without assignment—Rights of sub-mortgagee and of puisne mortgagee—Meaning of “mortgaged property”—See SUB-MORTGAGE, No. 1, 4 A.L.J. 273. (F.B.).

(31-a) S. 57 (a)—See No. 28, *supra*.

(32) S. 58 (c)—Mortgage by conditional sale—Date of repayment essential—See MORTGAGE (GENERAL), No. 15, 11 C.W.N. 400.

Transfer of Property Act. — (Continued).

(32-a) S. 59—See No. 30, *supra*.

(33) Ss. 59 and 98—Redemption and renewal of kanoni mortgage—See MORTGAGE (REDEMPTION), No. 10, 2 M.L.T. 161.

(34) Ss. 59, and 100—Document invalid as a mortgage, effect of, in creating a charge—Construction.

A document, which fails to comply with the requirements of S. 59, and is, in consequence, not a valid mortgage, can, nevertheless, operate to create a charge, upon the property mentioned therein, under S. 100, on the principle that legal effect should, if possible, be given to a legal intention clearly expressed (a). **Nellakantam Iyer v. Madasami Tevan**, 17 M.L.J. 39.

BENSON and RUSSELL, JJ.

References :—(a) 24 M. 399, R. 26 C. 78, *Diss.*

(34-a) S. 60—Right of one of several mortgagors to redeem the whole mortgage—See MORTGAGE (REDEMPTION), No. 23-a, 22 T.L.R. 91. c

(35) S. 60—See MORTGAGE (REDEMPTION), No. 4, 4 A.L.J. 74.

(36) Ss. 62 and 63—Mortgage—Redemption—Limitation Act, sch II, art 134—Mortgage by mortgagee's donee purporting to be of a proprietary interest in the mortgaged property—Foreclosure.

Under ordinary circumstances, a mortgagor cannot, before the time limited for payment to the mortgage expires, take proceedings to redeem the mortgage (a).

The widow of a usufructuary mortgagee in possession made a gift of the mortgaged property to A.H. The donee mortgaged part of the property, the subject of this gift, to P.N., purporting to mortgage the full proprietary interest in the property. P. N. took proceedings for foreclosure against A.H. as absolute owner and obtained foreclosure and possession of the property. *Held*, on the finding that P. N. acted *bona fide* and had no reason to suppose that A.H. was not, as he represented himself to be, the full owner of the property mortgaged, that P.N. was entitled, as against the representative of the original mortgagor, to the protection afforded by article 134 of the second schedule to Act No. XV. of 1877 (b). **Huseni Khanam v. Ali Hussain Khan**, A.W.N. (1907), 133 = 4 A.L.J. 375 = 29 A. 471.

STANLEY, C.J. and BURKITT, J.

Transfer of Property Act.—(Continued).

References:—(a) 14 Sim. 427, 5 B. 22, 8 A. 95, L.R. 1900, 1 Ch. 142. *R.* (b) 25 M. 99, 23 B. 614, *D*; 9 A. 97, 14 M.I.A. 1, 15 B. 583, 20 A. 482, 22 B. 225, 24 M. 471, 27 B. 373, *R.*

(36-a) S. 63—See No. 36, *supra*.

(37) S. 65—See MORTGAGE (GENERAL), No. 9, 2 M.L.T. 36.

(37-a) S. 67—See No. 8, *supra*.

(38) Ss. 67 and 99—*Mortgage—Money decree by mortgagee—Transfer of the decree—Assignee bound by provisions of S. 99.*

The transferee of a money decree obtained by a mortgagee against his mortgagor is bound by the restriction imposed upon the mortgagee by S. 99 of the Transfer of Property Act. He can, therefore, in execution of his decree, attach the property, but he shall not be entitled to bring the mortgaged property to sale, other wise than by instituting a suit under S. 67 of the Act. **Chhagan Guman v. Lakshman Daggdu**, 9 Bom. L.R. 728=31 B. 462.

CHANDAVARKAR and BEAMAN, JJ.

(39) Ss. 67 and 99—*Sale of mortgaged property otherwise than under S. 67—Void or voidable—Remedy by application or suit—Jurisdiction—Right of redemption—Civil Procedure Code, S. 244—Sale, confirmation of.*

Held (by the Full Bench), that a sale held in contravention of the provisions of S. 99 of the Transfer of Property Act is not a nullity, but an irregular and voidable sale.

Such a sale can be avoided by an application under S. 244, Civ. Pro. Code, before or after confirmation of the sale, on the ground that the provisions of S. 99 of the Transfer of Property Act have been contravened; but, if the application is made after confirmation, the applicant has to prove further that, owing to fraud or other reasons, he was kept in ignorance of the sale proceedings and the proceedings preliminary to sale. **Ashutosh Sikdar v. Behari Lal Kirtunia**, 11 C.W.N. 1011 (F.B.)=6 C.L.J. 320.

RAMPINI, C.J., BRETT, MITRA, WOODROFFE and MOOKERJEE, JJ.

(40) Ss. 67 and 99—*Money decree in favour of mortgagee—Transferee of money decree—Sale of mortgage property—Ss. 232, 233 of the C.P. Code—Attachment of mortgage property for money-decree.*

A transferee of money-decree obtained by a mortgagee is prohibited from selling the mortgaged property in execution of such decree, as

Transfer of Property Act.—(Continued).

the transferee, by virtue of Ss. 232 and 233 of the Civil Procedure Code, takes the decree subject to the conditions prescribed in S. 99 of the Transfer of Property Act. The fact that it is not open to the transferee to institute a suit, under S. 67 of the Act, as he is not the mortgagee, does not relieve him from the condition of not bringing it to sale otherwise than under S. 67 of the Act (a).

There is nothing in S. 99 of the Act to prohibit the attachment of mortgaged property. **Jeevarathanam Moodelkar v. Srinivasa Moodelkar**, 17 M.L.J. 503.

BENSON and WALLIS, JJ.

References:—(a) 27 A. 450, Diss. 9 Bom. L.R. 728, *Appr.* 22 C. 813, *R.*

(41) S. 68—*Anomalous mortgage—Personal covenant to pay—Decree for sale.*

Held, that, where a mortgage of a usufructuary character contains a personal covenant to pay, the mortgagee is entitled to sue for sale of the property, on the basis of such a covenant. **Sardar Singh v. The Collector of Shahjahanpur**, 10 O.C. 14.

SCOTT and CHAMIER, J. C.L.C.

*References:—*24 C. 677 and 12 A. 203, *R.* 27 M. 526, *followed*.

(42) S. 68, cl. (c)—*Dispossession of mortgagee by mortgagor, effect of—See MORTGAGE (USUFRUCTUARY), No. 1, 6 C.L.J. 143.*

(42-a) S. 69—See No. 2, *supra*.

(43) S. 72—*Mortgage—Redemption—Mortgagee paying a simple money-decree to save mortgaged property from sale—Charge—Malikana—Condition for recovery by separate suit—Set-off in account.*

A property in possession of certain usufructuary mortgagees was put up for sale in execution of a decree on a simple money bond of a prior date. The mortgagees paid up that decree, and prevented the sale. *Held*, that the mortgage being made after the date of the simple money bond, the mortgagees had an interest in protecting the mortgaged property from sale and were entitled to recover the amount of the simple money decree paid to save the property from sale, when subsequently the mortgagors sought to redeem the property.

In the mortgage deed the mortgagees had covenanted to pay Rs. 1,000 as *malikana* to the mortgagors. This was alleged not to have been paid up to the day the suit for redemption was

Transfer of Property Act.—(Continued).

brought. *Held*, that the mortgagors were entitled to the *malikana* allowance which should be credited to them in taking the accounts. The fact that under the terms of the deed the *malikana* could be recovered by a separate suit, would not prevent its being set-off at the time of redemption.

Where only some of the mortgagors executed further mortgages in favour of the mortgagees covenanting to pay the mortgage debts with the money payable on the prior mortgage *held* that this would not preclude the mortgagors as a body from exercising their right to redeem the earlier mortgage only. **Muham. mad Husain v. Sheodarshan Das**, 4 A.L.J. 176 = A.W.N. (1907), 71.

STANLEY, C.J., and BURKITT, J.

- (44) S. 74—*Mortgage—Sale of mortgaged property—Price applied to payment of mortgage debts—Payment not made by purchaser, but by mortgagor.*

A mortgagor sold certain property, which was subject to two mortgages, and it was agreed that the bulk of the consideration money should be paid by the purchaser to the mortgagees. The purchaser paid off the amount due on the first mortgage, but not that due to the second mortgagee. *Held*, on suit by the second mortgagee for sale, that the purchaser was not entitled to set up the first mortgage as a shield inasmuch as it had not in reality been paid off by him, but by the mortgagor, his vendor. **Bajinath v. Murlidhar**, A.W.N. (1907), 85 = 4 A.L.J. 349.

BURKITT, J.

Reference :—27 A. 400, F.

- (45) S. 76 (c)—*Mortgagee, when bound to pay Government revenue—Construction of mortgage deed.*

Under S. 76, cl. (c) of the Act, a mortgagee is bound to pay the revenue, only in the absence of a contract to the contrary, and if he is able to pay the same out of the income of the property in his hands (a).

A mortgage deed provided that the mortgagee was to appropriate for interest on the amount, the rent of paddy and Rs. 20 less the Government revenue, which was to be paid to the mortgagor by the mortgagee, pending the transfer of patta to the name of the mortgagee. *Held*, that the mortgagee, by the contract between the parties which allowed them to appropriate the income less the revenue, both of them ascertained

Transfer of Property Act.—(Continued).

amounts, was not liable to pay a subsequent increase in the assessment payable to Government (b). **Panigatan Kanaran v. Raman Nair**, 17 M.L.J. 517.

SANKARAN NAIR, J.

References :—(a) S.A. 525 of 1905, D; (b) 14 M.L.J. 488, R.

- (46) Ss. 76, 84, 89 and 92—See MORTGAGE (REDEMPTION), No. 1, 5 C.L.J. 192.

- (47) S. 78—*Existence of gross negligence—Failure of prior mortgagee to get possession of title-deed—Delay in registration.*

The existence of gross negligence, within the meaning of S. 78 of the Act, must be determined according to the circumstances of each case, and one of the circumstances to be taken into consideration is that, in this country, universal registration exists. Failure on the part of a prior mortgagee to get possession of title-deeds is not, therefore, in the absence of reasonable explanation, necessarily to be imputed to him as gross negligence (a).

Delay in getting the mortgage registered, which had the effect of enabling the mortgagor to effect a second mortgage, would not make the prior mortgagee's failure to obtain the possession of title-deeds amount in law to gross negligence. **Rengasawmy Naiken v. Annamalai Mudali**, 17 M.L.J. 499.

WALLIS and MILLER, JJ.,

References :—(a) 2 C.W.N. 750, F. L.R. 7 H.L. 135, L.R. 26, Ch. D. 482, 9 Hare 449, 18 B. 444, referred to; 12 M. 429, 13 M. 383, 12 M. 424, 15 M. 268, 4 M.H.C.R. 369, D.

- (47-a) S. 84—See No. 46, *supra*.

- (48) S. 85—*Parties—Parties claiming adversely to mortgagor, if necessary parties—Contract Act (I of 1872), S. 23—Illegal contract.*

S. 85 of the Transfer of Property Act does not require persons who claim adversely to the mortgagor to be made parties (a).

A mortgage contract is not illegal within the meaning of S. 23 of the Contract Act, merely because the mortgagors were entitled only to a half share and not the whole of the property mortgaged. **Jogo Mohan Deb Laskar v. Daudoong Burman**, 12 C.W.N. 94.

MITRA and CASPERSZ, J.

Reference :—(a) 32 C. 746, F.

- (49) S. 85—*Suit on mortgage—Parties—Notice—Person not known to be interested and*

Transfer of Property Act.—(Continued).

not made a party, if bound—Representation of debtor's estate by adult heirs only—Suit to redeem brought after sale—Limitation—Limitation Act (XV of 1877), Sch. II, Art. 12 (a).

In a suit to enforce a mortgage, the mortgagee made one only of two persons, who represented the estate of the mortgagor, a party defendant, not having notice of the existence of the other.

Held that the latter was bound by the decree obtained by the mortgagee, and his interest passed at the sale held in execution of the decree (a).

That, for the purpose of the suit, the estate of the mortgagor was sufficiently represented, as the person who was sued was alone in possession of the mortgaged property, and the other person, a minor, was not known to the mortgagee, and his interest did not appear to have suffered by reason of his not being made a party (b).

Sharfuddin, J.—A suit by the latter to redeem the mortgage, after the property had been sold as above, could not succeed without the sale being set aside, and not having been instituted within one year of his attaining majority, was barred under Art. 12 (a) of Sch. II of the Limitation Act. **Ram Taran Goswami v. Rameswar Malia**, 11 C.W.N. 1078 = 6 C.L.J. 719.

RAMPINI and SHARFUDDIN, JJ.

References:—(a) 21 A. 194, 28 C. 517, 6 B. 515, *relied on*; 4 C. 142, 7 A. 822, 14 C. 464, R. (b) 9 C.W.N. 201 = 32 C. 296 = 32 I.A. 23, F.

(50) S. 85—Applicability to mortgage suits in mofussil in Lower Burma—See MORTGAGE (GENERAL), No. 12, 3 L.B.R. 241.

(51) S. 86—No bar to a personal decree being granted for costs against mortgagor—See MORTGAGE (CONDITIONAL SALE), No. 2, 3 N.L.R. 97.

(51-a) S. 86—See No. 20, *supra*.

(52) Ss. 86* and 88—Decree for sale on a mortgage—rate of interest after date fixed for payment.

Where a decree for sale on a mortgage gives interest after the date fixed by the decree for payments of the mortgage debt, it is not necessary that such interest should be at the con-

Transfer of Property Act.—(Continued).

tractual rate. **Lachmi Narain v. Uman Dat**, A.W.N. (1907), 60 = 4 A.L.J. 219 = 29 A. 322.

STANLEY, C.J. and BURKITT, J.

References:—26 C. 39, 2 C.W.N. 249, R.

(53) S. 87—Final order for foreclosure or redemption—S. 2, Civ. Pro. Code—Decree—Right to redeem after due date fixed in decree for foreclosure or redemption—Equitable relief.

Every application, which initiates a proceeding under S. 87 of the Transfer of Property Act, is a "plaint," and the proceeding itself is a "suit," though not the original mortgage suit, within the meaning of those words in the definition of the term "decree" given in S. 2 of the Civ. Pro. Code. Therefore an order making foreclosure absolute, as well as an order that a redemption has taken place, is a decree and is, therefore, appealable (a).

The mortgagor is entitled to redeem the mortgaged property, as of right, before the date fixed for redemption in the decree for foreclosure or redemption. But, if default is made in the payment of the amount, the decree-holder is entitled to apply at any time after the *dies redemptionis* for an order absolute, and the Court is bound to pass such an order, unless, on sufficient cause, it extends the period of redemption. The mortgagee's right to foreclose after the due date is subject to an equitable relief allowed to the mortgagor on proper grounds. The equitable relief is one within the reasonable discretion of the Court, and is subject to all the usual principles governing the conduct of persons seeking such relief (b). **Laxmi Bai Nalkin v. Ramchandra Malhar**, 3 N.L.R. 146.

STANYON, A.J.C.

References:—(a) 3 N.L.R. 55, F.A. No. 36 of 1906 and 18 C. 500, *Appr*; 27 C. 705, *Diss*; 2 N.L.R. 137, 3 N.L.R. 55, F'; 27 C. 305, *Diss*.

(54) S. 87—Nature of proceedings between decree nisi and order absolute—Setting aside *ex parte* order absolute—Extension of time for redemption—See MORTGAGE (FORECLOSURE), No. 1, 3 N.L.R. 55.

(54-a) S. 87—See No. 20, *supra*.

(55) S. 88—Property subject to charge—Suit maintainable.

In a suit for sale on foot of a mortgage of properties subject to a charge for maintenance.

Transfer of Property Act.—(Continued).

held that the plaintiff did not occupy the position of a second mortgagee and could maintain the suit. The person entitled to maintenance from the properties had a charge thereon and was not a mortgagee. **Lalman v. Mohar Singh**, 3 A.L.J. 848 = A.W.N. (1907), 18 = 29 A. 205.

STANLEY, C. J. and BURKITT, J.

Reference :—13 A. 432, *Distd.*

(55-a) S. 88—See No. 52, *supra*.

(56) Ss. 88, and 90—Decree for sale—Land Acquisition proceedings—Compensation money—Application for execution against compensation money.

When the property covered by the mortgage was, under the Land Acquisition proceedings, converted into money, the lien which was attached to the property was transferred to that which then represented the property, namely, the compensation standing to the credit of the mortgagor in the Collectorate, and the mortgagee is entitled to take out in execution of a decree for sale of the mortgaged property, the money standing to the credit of the mortgagor in the Collectorate. It is not necessary for him to obtain a further decree under S. 90 of the Transfer of property Act. **Jatuni Chowdhurani v. Amar Krishna Saha**, 6 C.L.J. 745.

BRETT & MOOKERJEE, JJ.

Reference :—16 A. 78, *Diss.*

(57) Ss. 88 and 90—Mortgage decree—Personal liability for costs—Costs included in S. 90.

In drawing a decree under S. 88 of the Act, it will not only be opposed to the scheme of the Act, but also inequitable and opposed to the practice of the Court of equity in England, to make the mortgagor personally liable for costs, in any case, before the sale proceeds have proved insufficient to satisfy the mortgagee's claim (a).

Payment can be enforced personally against the mortgagor under S. 90, if the sale proceeds are insufficient to satisfy the mortgagee's claim, and the words "the amount due for the time being on the mortgage" include costs also (b). **Kamallamma v. Narasimha Charlu**, 17 M.L.J. 817 = 2 M.L.T. 359 = 30 M. 464.

BENSON and WALLIS, JJ.

References :—(a) 82 Beav. 213, L.R. 7 Ch. 507, &c; (b) 20 A. 523, R.

Transfer of Property Act.—(Continued).

(58) S. 89—Decree not in accordance with—Enforcement of decree—See COMPROMISE DECREE, No. 4, 6 C.L.J. 95.

(58-a) S. 89—Application for order absolute not in accordance with the Civil Rules of Practice—See LIMITATION ACT, No. 133, 17 M. L. J. 596.

(58-b) S. 89—See No. 46, *supra*.

(59) S. 90—Decree for sale on a mortgage—Property ordered to be sold in part not susceptible of sale—Abandonment of claim to sell such part.

Held that, on the true construction of the provisions of the Transfer of Property Act, 1882, a mortgagee is entitled, at any stage, to abandon his claim against any portion of the mortgaged property, and then obtain a decree under S. 90 for any balance due after crediting the amount realized by the sale of the property actually sold. **Pirbhu Narain Singh v. Amir Singh**, A.W.N. (1907), 83 = 29 A. 369.

RICHARDS, J.

References :—A.W.N. (1899), 208, D., 25 A 79, 26 A. 25, 28 A. 19, R.

(60) S. 90—Mortgage of occupancy rights—Rights not saleable—Personal decree not given.

The remedy given by S. 90 of the Transfer of Property Act is an extraordinary remedy and should be applied with great care and jealousy. Where, therefore, an occupancy holding was mortgaged to the plaintiff who could not sell it in execution of his decree, held, that a personal decree against the mortgagor should not be given, the mortgagee not having sold the property mortgaged. **Parbh Narain Singh v. Baldeo Narain**, 4 A.L.J. 157 = A.W.N. (1907), 69 = 29 A. 260.

KNOX, J.

Reference :—26 A. 25, D.

(61) S. 90—Application for personal decree for balance of judgment-debt not realised at mortgage-sale—Limitation—Limitation Act (XV of 1877), Sch. II, Arts. 116, and 178.

In making a supplemental decree under S. 90, Transfer of Property Act, the Court has to consider, if any question of limitation arises, whether the personal remedy was barred at the date of the institution of the suit, and not whether it would be barred at the date of the application under S. 93.

Transfer of Property Act.—(Continued).

Art. 178 of Sch. II of the Limitation Act does not apply to an application under S. 90, Transfer of Property Act (a).

The mortgage suit having in this case been brought within the period of limitation provided by Art. 116 of Sch. II of the Limitation Act, *held*, that the application under S. 90, Transfer of property Act, was not barred, though made more than three years after the date of the decree for sale. **Sheikh Rahamat Karim v. Sheikh Abdül Karim**, 11 C.W.N. 674 = 6 C.L.J. 119 = 34 C. 672.

MACLEAN, C.J., HOLMWOOD, J.

Reference :—(a) 22 C. 924, F.

(62) S. 90.—*Mortgage decree—Sale of the property after the usual period of six months—Personal liability for the unpaid balance—Mortgage decree should only reserve liberty to apply for decree under S. 90, and not order recovery of balance personally—Attachment of other property for recovering balance—Son born to mortgagor after the sale of the mortgage property, but before the sale of the other property under the personal decree—Son entitled to have exempted his share in the property from sale.*

On the 8th March, 1902, a decree on a mortgage was passed in favour of a certain person directing that the mortgaged property should be sold, on failure to pay the money within six months, and that, if the sale proceeds were insufficient to pay off the amount, the balance was to be recovered from G personally. In June, 1903, the mortgage property was sold in execution of the decree. On the 19th idem, D purporting to proceed under the personal decree for the balance, got attached a house belonging to G, which was not comprised in the mortgage.

On the 4th August, 1903, the sale was set aside on G's application. G then applied on 17th August, 1903, to have the attachment of the house raised. The Court directed the attachment to be maintained, but ordered that the property should not be sold, until the proceeds were found insufficient.

In September, 1904, G's son, V was born.

On the 26th November, 1904, the mortgaged property was again sold; and on the 5th January, 1905, D applied for the sale of the house, whereupon V applied to have the attachment removed from his one-half share in the house:

Transfer of Property Act.—(Continued).

Held, (1) that the decree, in so far as it directed personal payment by G, was passed in disregard of the provisions of S. 90 of the Transfer of Property Act. It was clear from the words of the section that that direction should have been in a supplement decree, to be passed when the net proceeds should be found to be insufficient. The original decree should merely have reserved to the plaintiff liberty to apply for a decree under S. 90;

(2) that the personal decree was contingent on the ascertainment of the balance, and would become operative and capable of execution, only when that balance was ascertained. It was, therefore, open to V to establish any circumstance, which affected the validity of the attachment, as against his interest in the house;

(3) that, therefore, the house, to the extent of V's interest therein, should be released from attachment. **Damodar Sakarchand v. Vyanku Gangaram** 9 Bom. L.R. 199 = 31 B. 214.

JENKINS, C.J., and DEAMAN, J.

(62-a) S. 90.—See Nos. 56 & 57, *supra*.

(63) S. 91.—See CIV. PRO. CODE, No. 130, 11 C.W.N. 495.

(63-a) S. 92.—See No. 46, *supra*.

(64) Ss. 92 and 93.—*Usufructuary mortgage—Redemption—Form of decree in a suit for redemption.*

An order, declaring that the plaintiff's right to redeem shall be extinguished, upon non-payment, within the time limited by a decree for redemption, of the amount found to be due, is not a proper order, when the mortgage sought to be redeemed is a usufructuary mortgage. Nevertheless, where such an order has been made and the decretal money has not been paid within the time limited, and the decree has been allowed to become final, the plaintiff cannot thereafter bring a second suit for redemption. **Lachman Singh v. Madsudan**, A.W.N. (1907), 137 = 4 A.L.J. 447 = 29 A. 481.

STANLEY, C.J. and BURKITT, J.

Reference :—24 A. 44, R.

(65) Ss. 92 and 94.—Decree in redemption suit—Nature and effect—See RES JUDICATA, No. 4, 4 A.L.J. 763.

(65-a) S. 93.—See No. 64, *supra*.

(65-b) S. 94.—See No. 65, *supra*.

(66) S. 95.—*Purchaser of equity of redemption—Suit for contribution after redemption*

Transfer of Property Act.—(Continued).

—*Necessity for obtaining possession by person redeeming.*

The term "mortgagor" in S. 95 of the Act cannot be held to exclude purchasers of equity of redemption who stand, for all other purposes, in the same position as mortgagors. (a)

The section must be read as if the words "obtains possession" ran as follows.—"obtains possession when the mortgagee had possession under his mortgage." Therefore, the section must not be limited in its application to the case of usufructuary mortgages only. (b)

Where a purchaser of equity of redemption of a mortgage by conditional sale, the mortgagee not having possession, redeems the property, he may sue the mortgagors for contribution and bring their shares to sale. **Mohan Seith v. Kashinath**, 3 N.L.R. 92.

BATTAN, A.J.C.

References:—(a) 8 B. 497, R: (b) 26 A. 227, F.

(67) S. 97—Mortgagee holding two mortgages over same property—Suit for sale on first mortgage—Subsequent suit on second mortgage barred—Remedy of mortgagee—See MORTGAGE (GENERAL), No. 1, 17 M.L.J. 301.

(68) S. 98—Application of, to anomalous mortgages executed before the Act—*Ubhaya-pattam* mortgage—See MORTGAGE (REDEMPTION, No. 11, 16 M.L.J. 462=1 M.L.T. 426=30 M. 61.

(68-a) S. 93—See Nos. 33, 38, 39 and 40, *supra*.

(69) S. 99—Mortgage by way of conditional sale—Money-decree on mortgage—Sale of equity of redemption—Purchase by mortgagee confers no title on him—Civ. Pro. Code, S. 244—Execution of decree—Sale—Suit for possession—Plea that sale was illegal—revision—Civil Cases—Material irregularity—Regulation XVII of 1806, Ss. 7 and 8.

The plaintiff, instead of proceeding to foreclose his mortgage by way of conditional sale under Regulation XVII of 1806, brought to sale the equity of redemption of the mortgaged property, in execution of a decree for money obtained by him on the mortgage, and purchased it himself and obtained formal possession through the execution Court. Afterwards, he brought the present suit for possession of the property as owner. It was pleaded that the

Transfer of Property Act.—(Continued).

suit was bad, for the plaintiff should have proceeded under the Regulation XVII of 1806. The plea was accepted on appeal, and the suit was dismissed, among others, on the ground that the sale was held in contravention of the provisions of S. 99 of the Transfer of Property Act.

It was contended on revision that the order of dismissal of the suit was wrong, for (1) the plaintiff was not bound to foreclose the mortgage under the Regulation, and Transfer of Property Act was not applicable to the case and (2) that the plea was barred by S. 244 of the Civ. Pro. Code.

Held, that the contentions had no force and there was no material irregularity for the exercise of revisional powers by the Chief Court. Though the Transfer of Property Act was not in force in the Punjab, the principle of S. 99 of the Act was of general application. **Jagan Nath v. Budhwa**, 157 P.L.R. 1906=2 P.R. (1907).

LAL CHAND, J.

References:—24 A. 549, 10 M.L.J. 110, 26 C. 777, 22 B. 624, 22 M. 372, It.

(70) S. 99, Sale in contravention of—Effect of purchase by stranger—Suit to set aside sale—Suit for redemption—Civ. Pro. Code, S. 244.

If a mortgagee brings the mortgaged property to sale in contravention of S. 99, Transfer of Property Act, the mortgagor, when he is a party to the suit, ought to object to the sale by proceedings in execution of the decree and not by means of a separate suit, to which S. 244, Civ. Pro. Code, is a bar. If the mortgagee himself becomes the purchaser in execution, the mortgagor may preserve his right to redeem the property (a), on the ground that the mortgagee cannot, by such a sale and purchase in contravention of Law, be allowed to free himself from the liability to be redeemed. No such equity, however, arises where the auction-purchaser is not the mortgagee and was no party to the suit.

A sale in violation of S. 99, Transfer of Property Act, is voidable only and not void (b). **Muthu v. Karuppan**, 17 M.L.J. 168=2 M.L.T. 181=30 M. 319.

WHITE, C. J., and WALLIS, J.

References:—(a) 22 M. 347, 22 B. 624 and 23 M. 377, R.(b) 22 M. 347, R.

(71) S. 99—Sale independently of the sectine—Sale for money decree—Party to decree and sale—Effect of such sale.

Transfer of Property Act.—(Continued).

Where a mortgagee, independently of S. 99 of the Act, purchases the mortgaged property, in execution of a money decree for an instalment of the mortgage-debt, the sale is only voidable and not void; and a person, who was a party to the suit and order for sale, will not be subsequently allowed to redeem the property, treating the sale as void. **Yenkayya v. Surayya**, 17 M.L.J. 325 = 30 M. 362.

° BENSON and WALLIS, JJ.

References:—22 M. 372, F; 5 B.L.R. 450, 22 B. 624, Diss; 32 C. 296 (P.C.), Expl; 16 C. 682 (P.C.), 17 M.L.J. 163, D; 19 M. 382, 29 M. 421, 27 A. 517, R.

(72) S. 99, sale of mortgaged property in contravention of—See MORTGAGE (REDEMPTION), No. 19, 4 A.L.J. 787.

(73) Ss. 99, and 100—Maintenance charged on family property—Sale of property in execution of maintenance decree—See MAINTENANCE, No. 2, 17 M.L.J. 217.

(74) S. 100—Suit for redemption converted into suit for property on payment of a charge—See PLEADINGS, No. 2, 10 O.C. 17.

(75) S. 100—Suit for recovery of arrears of rent under Central Provinces Tenancy Act—Charge—See (ACT XI OF 1898), No. 1, 3 N.L.R. 164.

(75-a) S. 100—See Nos. 34 and 73, *supra*.

(75-b) S. 105—See No. 79, *infra*.

(76) S. 106—Presumption as to monthly tenancies—Notice to quit when to be given.

In this country, the practice of letting on monthly tenancies is so widespread as to warrant the Legislature in raising a presumption in favour of monthly tenancies. When the tenant's entry takes place in the middle of a calendar month, and rent is payable from the date of entry, but the parties agree that the rent should be payable at the end of the calendar month, the reasonable inference is that they intended that the monthly tenancy should coincide with the calendar month.

In such cases, the 15 days' notice to quit must be so given as to expire with the end of the calendar month (a), and not with reference to the date of the entry or the lease, unless the intention of the parties appears to be contrary.

Obiter:—Where the interest of the lessor terminates altogether, and the title passes to the remainderman, and the lessee goes on holding under the remainderman, although in law a new tenancy is created, yet in giving notice to

Transfer of Property Act.—(Continued).

quit, the commencement of the former tenancy must be looked to (b). **Arunachella Chettiar v. Ramiah Naidu**, 16 M.L.J. 533 = 30 M. 109.

BENSON and WALLIS, JJ.

References:—(a) 7 A. 899, R; (b) 9 C. 181 R.

(77) Ss. 106 and 107—Unregistered annual lease—Notice to quit—See LANDLORD AND TENANT, No. 21, 11 C.W.N. 1124.

(28) Ss. 106, and 108, cl. 8 (j)—Ejectment—Notice to quit—Tenancy—Purchaser.

Under S. 108, cl. (j) of the Transfer of Property Act, a lessee, in the absence of a contract or local usage to the contrary, may transfer absolutely the whole or any part of his interest in the property.

A purchaser of the tenancy from the legatee of a deceased tenant, is not a trespasser, but is a lessee, within the meaning of S. 108, cl. (j) of the Transfer of Property Act, and is entitled to a notice to quit, as provided in S. 106 of the Act. **Habul alias Priya Nath Changa v. Kashimani Debi**, 5 C.L.J. 205.

MACLEAN, C.J., BANERJEE and STEVENS, JJ.

(78-a) S. 107—see No. 77, *supra*.

(79) Ss. 107 and 105—Lease—Signature of the lessor—Necessity for.

The written instrument by which a lease of immoveable property is made is to be signed by the lessor, although no special mention is made of the lessor's signature in the section. For a lease according to S. 105 of the Act is a kind of transfer; and a transfer can only be made by the person in whom the property to be transferred is vested, (*i.e.*) the lessor. **Turaf Sahib v. Esuf Sahib**, 2 M.L.T. 270 = 17 M.L.J. 395 = 30 M. 322.

BENSON and WALLIS, JJ.

References:—19 M. 52, 25 M. 55, D; 26 A. 368, 27 A. 136, 27 A. 190, F.

(79-a) S. 108 cl. (8) (j)—See No. 78, *supra*.

(80) Ss. 108, 114—See—LEASE, No. 3, 5 C.L.J. 208.

(81) S. 111 (g)—Right of landlord to eject a tenant transferring his dwelling house and the site thereof in *abadi*—See LANDLORD and TENANT, No. 7, 10 O.C. 31.

(81-a) S. 114—See No. 80, *supra*.

(82) S. 118—Exchange—Aposhnama setting off one decree against another—Registration

Transfer of Property Act.—(Concluded).

—*Admissibility in evidence—Registration Act (III of 1877), Ss. 17 and 49.*

The plaintiff and the defendant, having obtained decrees against each other, settled their differences by an *aposhinama*, by which the former gave up certain jotes to the latter, the decrees obtained by the plaintiff were set off against the decrees obtained by the defendant, and the parties gave up their claims under their respective decrees.

held, that the transaction embodied in the *aposhinama* did not amount to an exchange within the meaning of S. 118 of the Transfer of Property Act, the essence of such a transaction, viz., the mutual transfer of two things being wanting in this case ;

It was, therefore, not necessary to register the document ;

That S. 49 of the Registration Act was no bar to the document, which was unregistered, being used, as evidence to prove that the decrees had been satisfied, notwithstanding that it also purported to convey immoveable property. **Dina Nath Das v. Maimala Dassya**, 11 C.W.N. 342.

GHOSE and CASPERSZ, JJ.

(98) S. 118—Exchange—Transfer by co-occupant of a divided share in a survey number party for cash and partly in exchange for another land—Right of pre-emption—See LAND REVENUE CODE (BERAR), No. 2, 3 N.L.R. 138.

(84) S. 119—See LIMITATION ACT, No. 24, 17 M.L.J. 149.

(85) S. 123—Deed of gift registered—Delivery of possession not essential—Erroneous opinion of Courts of Central Provinces, effect of—See APPEAL (SECOND APPEAL), No. 1, 11 C.W.N. 956.

(86) S. 126—See No. 12, *supra*.

(87) S. 130—See No. 10, *supra*.

(88) S. 135—See Nos. 9 and 10, *supra*.

Trees.

(1) Right to, on tenant's holding—See LANDLORD AND TENANT, No. 2, A.W.N. (1907), 150.

(2) Right to—See LANDLORD AND TENANT, No. 3, 6 C.L.J. 218.

Trespasser.

(1) Mortgage with possession—Redemption by trespasser—Mortgagor's right—See LIMITATION ACT, No. 113, U.B.R. (1906), Limitation, 9.

Trust.

(1) Applicability of S. 539, Civ. Pro. Code, to—Suit by the whole body of persons authorised to administer the trust—See CIV. PRO. CODE, No. 261, A.W.N. (1906), 260=3 A.L.J. 773=29 A. 27.

(2) Statute of limitation does not apply in case of express trust—See LIMITATION, No. 4, 9 Bom. L.R. 287.

(3) Suit by author of trust against trustee to recover trust-property, on failure of object of trust—Limitation—See LIMITATION ACT, No. 23, 132 P.R. 1907.

Trust-deed.

—for securing mortgage debentures—Stamp duty—See STAMP ACT, No. 3, 4 L.B.R. 2 (F.B.)

Trustee.

(1) Removal of, by beneficiary or co-trustees—Trustees cannot remove a co-trustee without the sanction of Court—Specific Relief Act (I of 1877), S. 42—A trustee who has been removed can sue for declaration of his trusteeship—Removal of trustee by a caste is not a caste question—Friction or hostility not a ground for removal—The intention of the parties to a deed must be gathered only from the deed—Evidence.

An instrument creating a trust may confer on its beneficiaries the power to remove a trustee appointed under it and appoint a new one in his place ; but the power must be exercised reasonably, and the Court will not uphold the removal, unless it is satisfied that the power was exercised for the benefit of the trust, and not in a capricious manner (a).

Trustees were appointed by a deed of trust, executed by members of a caste, which contained no provision empowering the caste to remove them. One of the trustees was excluded from the management of the trust-property by his co-trustees. He filed a suit asking for a declaration of his trusteeship and for an injunction to restrain the defendants from denying to him, or otherwise interfering with, his rights as a trustee :—

Held, (1) that no beneficiary or trustee has any right to remove a trustee. There is no difference in this respect whether the beneficiary is an individual or a caste.

(2) that, where the legal character of a person is denied, he is entitled, according to S. 42 of the Specific Relief Act, to institute a suit " against any person denying " such character. Because there are other persons than those

Trustee.—(Concluded).

sued, who also are denying the right, it does not follow that he must sue them all :

(3) that the plaintiff was entitled to the declaration and injunction prayed for.

The question of the power of a caste to remove a trustee of any of its charitable trusts is not a caste question. A caste has power to do what it likes for the internal regulation of its affairs : and all questions relating to them are caste questions. But where a caste deals with its own property and creates civil rights in others according to law, the rights and obligations arising out of such dealing do not appertain to caste questions as such, or the internal regulation of its own domestic or social affairs. They are legal rights and legal obligations enforceable by our Courts, as much as if any entity, such as a private person, had been a party to their creation. The fact that the caste happens to be a party to the creation is merely accidental. Where a trust is created, whether by a caste or by an individual, the same law applies to both.

Friction or hostility between trustees and the immediate possessor of the trust is not of itself a reason for the removal of the trustees. But where the hostility is grounded on the mode in which the trust has been administered, when it has been caused wholly or partially by substantial overcharges against the trust estate, it is certainly not to be disregarded (b).

The intention of parties to a deed must be gathered from the language they have used, and, where the words of the deed are clear, all evidence of what occurred or what was said when the parties were in a state of negotiation, is inadmissible. **Chapsey Cooverji v. Jethabhai Nursey**, 9 Bom. L.R. 514.

CHANDAVARKAR, J.

References :—(a) 2 Jo. and Lat. 95, R. (b) 9 App. Cas. 371, 381, F.

(2) Temple trustee's personal liability for debt—See RELIGIOUS ENDOWMENTS, No. 4, 2 M.L.T. 268.

(3) Suit against trustees of public charities—Sanction under S. 539, Civ. Pro. Code—Conformity between suit and sanction—See Civ. Pro. Code, No. 262, 110 P.R. 1907.

Trusts Act (II of 1882).

(1) S. 53 of the Act strikes at transactions entered into by a trustee for his own profit after he has accepted the trust and while he is performing the duties of the office. But it does not

Trusts Act (II of 1882).—(Continued).

render void a mortgage, in favour of a person, created before he becomes trustee of the property by the deed of trust itself as a condition of the trust imposed by the settlor.

There is nothing in the Act, that a *cestui que trust* shall not be appointed a trustee. He is not as such incapacitated from being a trustee for himself and others ; but, as a general rule, he is not an altogether fit person for the office in consequence of the probability of a conflict between his interest and his duty. **Ashidbai v. Abdulla Haji Mahomed**, 8 Bom. L.R. 652 = 31 B. 271.

CHANDAVARKAR, J.

(2) S. 75.—Property dedicated to charitable uses—Construction of document—See REGISTRATION ACT, No. 5, 9 Bom. L.R. 1071.

(3) Ss. 88 and 96—*Executor—Trustee—Surviving partners, liability of, when carrying on the trade—liability to account to the legal representative of the deceased partner—Relation between surviving partner and legal representative of deceased partner—Co-Executor—Transfer of business to the surviving partner—Good faith of co-executor in the transaction—Onus of proving good faith—Evidence Act (I of 1872), S. 111—Good will—Survival of good will.*

Under S. 88 of the Trusts Act, 1882, a person, who occupies the position either of an executor or of a partner, must hold for the benefit of any person, whose interests he is bound to protect, every pecuniary advantage he has gained for himself in each of the following cases : (1) if he has gained the advantage by availing himself of either character, or, (2) if he has gained the advantage by entering into any dealings, under circumstances, in which his own interests are of ever may be adverse to those which he is bound to protect. Thus, in both cases, one essential condition of liability is " an advantage gained." In the first, there must also be unconscientious conduct. In the second, that is not necessary, if there were a possibility of conflict between interest and duty. Under the section, there is no saving clause for cases of good faith.

The section, therefore, taken by itself, does not validate a purchase by an executor of the trust property, either on the ground of *bona fide* assent by his co-executor or of good faith in the executor himself, who, under the section, could not retain an advantage, even though

Trusts Act (II of 1882). (Continued).

unconsciously obtained in the transaction, where his interest and duty were in conflict.

A surviving partner, being a person who holds the property by virtue of a contract, may buy the property in trade of his deceased co-partner, under proviso (b) to S. 95 of the Trusts Act; but, inasmuch as his interests in the transaction may conflict with his duty, he is even then precluded by S. 88 from retaining for himself any advantage he may have acquired by the bargain. That is, he must give full value or what he could reasonably believe to be full value. There is no exception in favour of a co-executor or surviving partner, who transgresses those limits with the assent of a *bona fide* executor. The only saving clause, which protects the executor or surviving partner transgressing those limits from the liabilities attaching to an ordinary trustee, is that contained in S. 96.

S. 96 of the Trusts Act applies to all the various classes of so called constructive trustees described in Ch. IX, and differentiates them from trustees properly so called, by declaring that nothing in the chapter relating to them shall impair the rights of transferees in good faith for consideration. And that is the only provision that saves an executor buying his testator's assets from liability for advantage gained unwittingly in the bargain, and a surviving partner purchasing under proviso (b) of S. 95 is yet subject to the latter part of S. 88 and could only retain an advantage thereby gained, on proof of good faith as well as of consideration. The good faith must be good faith in the transferee. The good faith of a co-executor will not avail him.

It appears from ill. (f) to S. 88 of the Trusts Act, that the section demands from a surviving partner the same *uperrima fides* as regards the interests of a deceased partner as was due before death had dissolved the partnership, so far as the profits arising from the capital of the deceased are concerned. For these he must account to the legal representative, though, no doubt, when he has done so, there is nothing there to prevent him from receiving the assets in purchase or loan from such representative. But, so long as he is under that liability to account, he is evidently within the meaning of the phrase which classes him with "other persons bound in a fiduciary character to protect the interest of another."

Under the Indian Trusts Act, surviving partners are not classed with trustees; but they are subject to obligations in the nature of

Trusts Act (II of 1882).—(Concluded).

a trust and are classed with persons bound in a fiduciary character to protect the interests of others, and the same duties, liabilities, and disabilities, so far as may be, attach to them as to trustees, subject to the provisos in S. 95 and the saving provisions of S. 96 of the Act.

S. 111 of the Indian Evidence Act applies to the question of good faith arising under S. 96 of the Indian Trusts Act.

In the absence of agreement, the good will of a business does not survive. (a). **Hasanali Mahomed Ali v. Esmailji Sulemanji**, 9 Bom. L.R. 606.

BATTY, J.

Reference :—(a) 1 Ch., 378, F.

(4) S. 96—See No. 3, *supra*.

Unascertained Goods.

Sale of—Appropriation—Conditional appropriation—See CONTRACT ACT, No. 40, 34 C. 173.

Unchastity.

(1) Agreement to pay pin-money to daughter-in-law—Her unchastity—Whether she is entitled to enforce it. See MARRIAGE, No. 2, 4 A.L.J. 18.

Unconscionable bargain.

(1) Bond—Circumstances under which relief may be granted by the Court.

A person of the age of some twenty-eight years, the son of a wealthy father, but of profligate habits and greatly in need of money, his father having refused to supply him, executed a bond to secure a sum of Rs. 500 with interest which amounted to Rs. 37-8-0 *per centum per annum* with six-monthly rests. The bond further contained a stipulation that the borrower should not be empowered to repay the money within three years, and if he did pay within three years, he should nevertheless be obliged to pay three year's interest at the rate mentioned. *Held*, though it could not be said that the execution of this bond was procured by means of undue influence, or that the rate of interest was penal, nevertheless, the bargain was an unconscionable bargain, against which the Court might properly give relief. The High Court affirmed the decree of the lower appellate Court, which gave the plaintiff the principal sum, with simple interest at the rate of 24 *per centum per annum*. **Balakrishnan Das v. Madan Lal**, A.W.N. (1907), 55 = 4 A.L.J. 222 = 29 A. 308.

KNOX and RICHARDS, JJ.

Unconscionable bargain.—(Concluded).

References:—9 A. 238, 25 A. 284, 12 C. 225, 20 I.A. 112, 127, R.

Under Ralyat.

- (1) *Heritability—Bengal Tenancy Act (VIII of 1885), S. 49.*

The heirs of an under-ralyat under an annual holding do not acquire an interest in his holding by inheritance. The only right which they have, irrespective of custom or local usage, is to remain in possession of the land, until the end of the agricultural year, for the purpose of either realising the rent, which might accrue during that year, or for the purpose of tending and gathering in the crops. **Jamini Sundari Dasi v. Rajendra Nath Chukrabutty**, 11 C.W.N. 519.

MOOKERJEE, J.

Reference:—8 C.W.N. 479, *Expl.*

- (2) Suit for ejectment of under-ralyat, whether notice necessary—See ACT VIII of 1885, (BENGAL TENANCY), No. 20, 11 C.W.N. 190.

Undue influence.

- (1) *Exercise of—Will obtained by undue influence—Undue influence, what amounts to, in case of will—Confidential position.*

Held, that in order to set aside a will on the ground of undue influence, it is not sufficient to establish that a person, who is largely benefited under the will had the power to overbear the will of the testator, but it must also be shown that such power was exercised and that it was by the exercise of such power that the will was obtained. **Shabbuti Singh v. Musamat Mula**, 10 O.C. 76.

CHAMBER, J. C.

References:—7 L.R.H.L. 448 (471), L.R. 1894, P.D. 151, L.R. 2 P. and D. 469, 11 P.D. 81, 2 Leading Cases in Equity, 462, R.

- (2) Fiduciary relationship of father and adopted son in case of gift by son to father—Burden of proof of undue influence—See CONTRACT ACT, No. 4, 17 M.L.J. 19.

- (3) What constitutes—Loan borrowed by person in urgent need—Promise to pay time-barred debt with interest—Validity—See CONTRACT ACT (IX of 1872), No. 6, 9 Bom. L.R. 1164.

- (4) Circumstances sufficient to make out a *prima facie* case of—See CONTRACT ACT, No. 5, 9 Bom. L.R. 1296.

Usury Laws Repeal Act.

See ACT XXVIII of 1855.

Utbandi Tenure.

- (1) *Suit for rent of—Abandonment—Notice—Onus—Benami sale—Admission by vendor, effect of.*

No notice is required to be given by the tenant to the landlord in abandoning an *utbandi* tenure, as it is a settlement for a year only (a).

In a suit for rent by an assignee of the landlord, when the landlord admits that he has sold the arrears of rent to the plaintiff, and, when such landlord is also a party to the suit, it is not open to the Court to find that the sale is benami. **Amrita Lal Mukherjee v. Giridhar Ghose**, 5 C.L.J. 398=11 C.W.N. 581.

BRETT and SHARFUDDIN, JJ.

Reference:—17 C. 398, R.

Valuation.

- (1) —of land—Market value—valuation by a hypothetical scheme—Development of small areas—Questions of demand and supply—Theory of economic rent—See ACT I of 1894 (LAND ACQUISITION), No. 14, 9 Bom. L.R. 1282.

- (2) Suit for recovery of specific movables—Refusal of defendant to produce—Plaintiff's valuation accepted—See MOVEABLE PROPERTY, No. 1, A.W.N. (1907), 227.

Valuation of appeal.

- (1) *Further appeal to Chief Court of the Punjab—valuation for purposes of jurisdiction—Punjab Courts Act, 1884, S. 40 (1), (b)—Suit for possession of land after foreclosure of mortgage.*

This was a suit for possession of land assessed to land revenue, on the allegation of an already completed foreclosure. The question for decision was whether having regard to S. 40 (1) (b), of the Punjab Court's Act, 1884, the value of the property was such as to give a party a right of further appeal to the Chief Court. *Held*, 30 times *Jama* assessed on the land being less than Rs. 1,000, a further appeal was prohibited by S. 40 (1) (b), of the Act. The contention that the property involved in the foreclosure decree was worth more than Rs. 1,000, and, that, consequently a further appeal was permissible, was rejected as untenable. **Yair Singh v. Sirmukh Singh**, 84 P.R. 1906=66 P.L.R. 1907.

JOHNSTON and RATTIGAN, JJ.

Reference:—24 P.R. 1906, R.

Valuation of suit.

- (1) *Appeal, forum—Mesne profits—Interest, —Suit, original, value of—Court Fees Act (VII of 1870), S. 11—Suits Valuation Act (VII of 1887), S. 8—Statute—Language of doubtful import.*

Where a plaintiff definitely fixes a certain sum as the amount of his claim, this is the value of the original suit, and the appeal lies accordingly: but when he fixes a certain sum as the amount of his claim, only approximately or tentatively, and prays that the amount of his claim may be ascertained in the course of the suit, the general rule is, that the amount found by the Court to be due to him is the value of the original suit, for the purpose of determining the forum of appeal.

Per Curiam.—When, in a suit for possession of land and mesne profits, which is originally valued at a sum below Rs. 5,000, and which is instituted in the Court of a Subordinate Judge, but in which the whole amount actually found due, inclusive of mesne profits payable by the defendant to the plaintiff, is over Rs. 5,000, an appeal lies to the High Court, and not to the District Court. (a)

In estimating the value of the original suit, the interest on the amount of mesne profits, subsequent to the institution of the suit, is not to be taken into consideration.

Per Mookerjee, J.—The value of the original suit means the value of the relief claimed in the original suit. The valuation of a suit as made by the plaintiff may be either definite or approximate. In the latter case, the relief claimed is tentative, and not final, and such approximate valuation does not determine the forum of appeal. The Court makes an investigation and determines the amount which the plaintiff is entitled to recover. When the plaintiff upon such adjudication accepts the amount determined by the Court, the value of the relief obtained by him, which is in substance also the relief claimed by him, is the value finally determined. In such a case, if the defendant prefers an appeal, he is entitled to proceed on the assumption, that the real value of the original suit is the value as adjudged by the Court and accepted by the plaintiff. If such value exceeds Rs. 5,000, the appeal lies to the High Court (b).

The forum of appeal depends, not merely upon the value as adjudged, but upon the value as accepted by the plaintiff after adjudication (c).

Valuation of suit.—(Continued).

When the plaintiff accepts the decree for the amount of mesne profits found and allowed by the first Court, the original valuation made in the plaint, which was approximate and tentative, is altered, and the valuation as determined by the first Court becomes the plaintiff's valuation.

Where the plaintiff asked for past as well as future mesne profits, and paid Court-fees on the amount claimed for past mesne profits only, the provisions of S. 11 of the Court Fees Act were applicable in respect of the whole suit (d).

Under S. 8 of the Suits Valuation Act, the value of the suit upon which the Court-fee has been assessed and paid without objection, is the value for the purposes of jurisdiction.

Where a statute uses language of doubtful import, and has been interpreted in a particular manner for a number of years, the interpretation given to that obscure meaning may reduce the uncertainty to a fixed rule. **Ijjetulla Bhuiyan v. Chandra Mohan Banerji**, 6 C.L.J. 255 (F.B.) = 11 C.W.N. 1153 = 34 C. 954.

RAMPINI, A.C.J., BRETT, MITRA, WOODROFFE, and MOOKERJEE, JJ.

References :—(a) 31 C. 365, *Appr.* and 8 C.W.N. 233, *considered.* (b) 17 C. 704; 6 C.W.N. 346; 23 C. 536; Unreported Reg. Appeal No. 32 of 1898 decided by Ghose and Pratt, JJ. on the 18th January, 1901, *Appr.* (c) 21 C. 550, *R and doubted*; 16 A. 286, *discussed.* (d) 33 C. 1232, *Appr*; 15 B. 416, *Diss.*

(2) Jurisdictional value of suit to establish right to attached property.

Where the amount of the decree, in execution of which property is attached, is less than the actual or alleged value of the property, the jurisdictional value of a suit to establish a right to the attached property must be held to be the value of the decree (a).

The amount of the decree, in such cases, is really all that has to be regarded, for the decree can be satisfied and the attachment removed, on payment of the amount decreed, and it is to secure the decretal amount, and nothing else, that the decree-holder is presumed to be executing his decree. It is quite immaterial, that, in a subsequent paragraph of the plaint, the property attached is alleged to be worth considerably more than the value of the decree. **Zorawar Singh v. Dewa**, 142 P.R. 1906 = 11 P.W.R. 1907 = 68 P.L.R. 1907.

RATTIGAN, J.

Valuation of suit.—(Continued).

Reference :—(a) 55 P.R. 1906, F.

- (3) *Suit for recovery of property subject to charge—Court Fees Act, S. 7, cl. IX—Forum of appeal.*

Held, that, where a plaintiff brings a suit for the recovery of certain property subject to a charge for an unknown amount, the value of the suit is the real value of the property, and not the supposed amount of charge, and the *forum* is to be determined accordingly. **Mohammad Baqar v. N. M. Baqar Khan Ali**, 10 O.C. 42.

SCOTT and CHAMIER, J.C.

- (4) *Suit for declaration that sale of ancestral agricultural land would be void after alienor's death—Punjab Courts Act, S. 40 (b).*

For purposes of S. 40 (b) of the Act, the value of a suit for a declaration that a sale of ancestral agricultural land by a male proprietor would be void after the alienor's death, is the value of the land calculated at thirty times the land revenue, and not the amount of consideration for the sale. **Jalla v. Gehna**, 60 P.R. 1907 (F.B.).

CHATTERJI, ROBERTSON, and RATTIGAN, JJ.

Reference :—145 P.R. 1892, *Appr.*

- (4-a) *Suit by reversioner for declaration that a mortgage by widow will not affect his interest—See Act XVIII of 1884 (PUNJAB COURTS), No. 2, 42 P.R. 1907.*

- (5) *Suit to set aside sale of properties subject to mortgage—Jurisdiction.*

Where what was sold in execution of the decree obtained by the defendant against the plaintiff, and what was delivered in pursuance of the sale was only the equity of redemption, and the plaintiff likewise seeks to set aside or impugn the sale only so far as the equity of redemption is concerned, the subject-matter of the suit is the equity of redemption in the properties and not the properties themselves or the full right in them. The correct value of the suit is therefore the value of the equity of redemption, and the jurisdiction of the Court must be determined according to such value. **Pullmugathu Aiyar Chittambara Thanu v Subramaniya Jada-vallabhar Ramasubba Yadhyar**, 22 T.L.R. 86.

PADMANABHA IYAR and EAPAN, JJ.

- (6) *Acceptance of lesser sum than the suit-amount by consent decree—Appeal against*

Valuation of suit.—(Concluded).

order passed in execution of such decree—Jurisdiction—See APPEAL (GENERAL), No. 2, 6 C.L.J. 38.

Voluntary payment.

- (1) *Payment into inferior Court with knowledge of attachment by higher Court—See CIV. PRO. CODE, No. 254, 17 M.L.J. 488.*

- (2) *Property of third person sold in execution—His remedy—Right to recover money erroneously deposited under S. 310-A, C.P.C.—See CONTRACT ACT, No. 34-b, 12 C.W.N. 151.*

Wagering Contract.

- (1) *Elements determining the nature of—Duty of Court—See CONTRACT ACT, No. 19, 9 Bom. L.R. 125.*

Waiver.

- (1) *—is a question of fact—Appeal to Privy Council—Ground not taken in the Appeal Court in India.*

A question of waiver was decided adversely to the Appellant by the Court of first instance and was not submitted for review to the Appeal Court in India ;

held—that the question being one of fact, the Judicial Committee had no power to entertain the appeal. **Dhanukdhari Singh v. Mahabir Pershad Singh**, 11 C.W.N. 739 (P.C.) = 6 C.L.J. 11 = 9 Bom L.R. 651 = 2 M. L.T. 193 = 17 M.L.J. 353.

LORD ROBERTSON, LORD COLLINS and SIR ARTHUR WILSON.

- (2) *Civ. Pro. Code, Ss. 244, 291, and 311—Execution sale brought about by fraud—Waiver of right to object to sale—Plea of waiver when to be given effect to and to what extent—Public policy—Circumstances from which waiver to be inferred—Knowledge of rights waived, necessity of proving—Burden of proof—Presumption.*

A waiver is an intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right, and there can be no waiver, unless the person against whom the waiver is claimed had full knowledge of his rights and of the facts, which would enable him to take effectual action for the enforcement of such rights.

The burden of proof of such knowledge is on the person who relies on the waiver, and such knowledge must be made to appear. A

Waiver.—Concluded.

presumption of waiver cannot be rested on a presumption that the right alleged to have been waived was known.

When it appeared from the proceedings that a judgment-debtor only waived objections to an execution sale, on the ground of (1) non-issue of fresh sale-proclamations when the sale was adjourned from time to time, and (2) inadequacy of price as resulting therefrom.

held—that this did not prevent him from attacking the sale on the ground (1) that the sale proclamation had never been issued and had been fraudulently suppressed at the decree-holder's instance and (2) that the price realised was inadequate by reason of the decree-holder's fraud.

Whether there has been a waiver or not of the rights of a judgment-debtor to object to a sale and to what extent they may have been waived must depend upon the circumstances of each individual case; and the question has to be decided, not merely upon the language of the petitions preferred by the judgment-debtor, but with regard to the whole of the proceedings in the case, and particularly with reference to the order made by the Court upon the petitions.

The right of waiver is subject to the control of public policy, which cannot be contravened by any conduct or agreement of the parties; and an agreement which seeks to waive an illegality may be void on grounds of public policy or morality.

Quære—Whether, if it were made out that the judgment-debtors had, in fact, waived all possible rights to object to the validity of the sale, a Court of justice would give effect to the plea of waiver, when the sale was brought about by fraud upon the processes of the Court. **Dhanukdhari Singh v. Nathima Sahu**, 11 C.W.N. 848=6 C.L.J. 62.

MOOREHEAD and HOLMWOOD, JJ.

(3) Instalment bond—Liberty to sue on default—Option not exercised—Acceptance of subsequent instalments—See **LIMITATION ACT**, No. 72, 4 A.L.J. 336.

Wajib-ul-arz.

(1) Rights of Zemindars in respect of house-sites and grove-lands—See **LANDLORD and TENANT**, No. 9, A.W.N. (1906), 307=4 A.L.J. 38.

(2) Construction of—Contract or custom—See **PRE-EMPTION**, No. 4, 3 A.L.J. 850=A.W.N. (1907), 17.

Wajib-ul-arz.—(Concluded.)

(3) Permission to tenants to transfer only materials—Sale of house in execution of decree—Rights of purchaser—See **LANDLORD and TENANT**, No. 6, 10 O.C. 4.

(4) Evidentiary value of chakwar wajib-ul-arz—Conflict between earlier and later—See **PRE-EMPTION**, No. 13, 44 P.R. 1907.

(5) Construction of,—whether record of custom or contract—See **PRE-EMPTION**, No. 28, A.W.N. (1907), 285.

(6) Ownership of resumed *muafi* land—See **PRE-EMPTION**, No. 22, A.W.N. (1907), 173.

Widow.

Decree against, in fair trial, whether binds reversioners—See **ESTOPPEL**, No. 2, 6 C.L.J. 621.

Widow re-marriage.

Widow acquiring right in occupancy holding—Effect of re-marriage—Mistake of law—See **ACT II OF 1901 (AGRA TENANCY)**, No. 3, 4 A.L.J. 475.

Widow Re-marriage Act.

See **ACT XV OF 1856**.

Will.

(1) *Execution under pressure—Free agency—Importunity—Indian Succession Act (X of 1865), S. 48, illus. (g) and (h).*

A will is not invalidated on the ground of its having been executed under pressure, unless the pressure was such as the testator could not resist. *Illus. (g) and (h) of S. 48 of the Succession Act* practically lay down the rule, which should guide all Courts on the question of importunity. They indicate the law as stated in "Williams on Executors and administrators." **Jajneshwari Saha v. Ugreshwari Dassya**, 11 C.W.N. 824.

MITRA and CASPERSZ, JJ.

(2) *Construction of—Bequest "for purposes of popular usefulness or for purposes of charity" is void for uncertainty—Charitable purposes if mixed with other indefinite purposes, the whole gift fails.*

Where, in a will, the following clause occurred: "As to whatever immoveable (and) moveable (property) in cash belonging to me may be in excess or may remain over as surplus, after a disposition shall have been made in accordance with what is stated in the clauses above written, my above-mentioned six executors are to make use of the same, in such manner as they

Will.—(Continued).

may unanimously think proper for purposes of popular usefulness or for purposes of 'charity.' And I give to them (*i.e.*) my above-mentioned trustees full authority to use (the same) in that manner."

Held, that the bequest "for purposes of popular usefulness or for purposes of charity" was void for uncertainty.

Held, also, that the "purposes of popular usefulness" was different from "purposes of charity" and the word "or" was disjunctive.

Where charitable purposes are mixed up with other purposes of such a shadowy and indefinite nature that the Court cannot execute them, such as "charitable or benevolent" or "charitable or philanthropic" or "charitable or pious" purposes, or where the description includes purposes, which may or may not be charitable, and a discretion is vested in the trustees, the whole gift fails for uncertainty. **Trikumdas Damodhar v. Haridas Morarji**, 9 Bom. L. R. 560 = 31 B. 583.

JENKINS, C. J., and BEAMAN, J.

(3)—*speaks from the date of death—Hindu wills, loss of the original—admission of testator—Presumption as to destruction and revocation of wills in India and under English law.*

A will must be construed as speaking and taking effect with reference to the state of things in existence immediately before the testator's death. This principle applies to Hindu wills also.

Where the original will is not to be found, there is a presumption in English law that it has been destroyed. But the presumption is not so strong in India, as in other countries, where wills are taken greater care of.

Where there was no evidence of the destruction of the will by the testator, but the plaintiffs relied on the non-production of the will and the deposition of certain witnesses, who said that the testator had admitted having destroyed the will, *held* that these facts were not sufficient to establish the presumption of revocation. **Ship Sabitri Prasad v. The Collector of Meerut**, 3 A.L.J. 747 = A.W.N. (1906), 295 = 29 A. 82.

KNOX and AIKMAN, JJ.

(4) *Construction of the word "dharma" in bequests.*

Will.—(Continued).

Per WHITE, C.J.—The Privy Council decision in 26 I.A. 71 must be followed in construing the word "dharma."

Per SUBRAHMANYA AIYER, J.—The word "dharma" denotes objects indicated by the terms *ishta* and *poorta*. *Ishta* gifts refer to gifts at the altar in connection with sacrificial ceremonies and the objects of the gift are as certain as they can be. *Poorta* works include service to fellow beings, such as constructing tanks, wells, temples, feeding, etc. Gifts for "dharma" should, therefore, be upheld as intended and understood to be for definite objects known to the people, even were that word devoid of a technical import. **Parthasarathi Pillay v. Thiruvengada Pillay**, 2 M.L.T. 198 = 17 M.L.J. 379 = 30 M. 340.

(5) *Construction of—Right to sue by the brother of the testator who was prohibited by the will from interfering with the latter's affairs—Trial of issue on private matters not relevant to the suit.*

A testator bequeathed all his property, in the absence of a son, to his widow for life and, after her to his daughter's son, if any. Failing these, the widow was to take the estate absolutely, subject only to a condition that she should not alienate it to any member of her father's family. The will expressly prohibited the interference of the testator's brother in his affairs. After the death of the testator leaving an only daughter, the widow gave out that she had given birth to a posthumous child. The brother of the testator thereupon sued for declaration that the posthumous child was not the son of the testator. *Held*, that the plaintiff had no status to maintain the suit, as he was neither an immediate nor a remote reversioner.

The procedure adopted by the lower Courts, of inquiring into the private affairs of the defendant's family, in considering an issue regarding the alleged legitimacy of the posthumous child, which was not wholly relevant to the suit, was severely criticised. **Rallia v. Gokal Chand**, 139 P.R. 1907.

ROBERTSON and KENSINGTON, JJ.

(6) *Attesting witnesses ignorant of the contents—Validity of will—See MAHOMEDAN LAW (WILL), No. 1, 10 O.C. 209.*

(7)—*due execution and attestation of—Acknowledgment of execution—What amounts to attestation—Indian Succession Act, S. 50—*

Will,—(Concluded).

Hindu Wills Act—See PROBATE, No. 1, 6 C.L.J. 453.

Worship.

Right of, if heritable and devisable—Alienation of right of—See HINDU LAW (RELIGIOUS ENDOWMENTS), No. 1, 11 C.W.N. 782.

Written statement.

—not signed or verified—Objection to, taken on appeal, after case fought out on merits—See CIV. PRO. CODE, No. 81, 11 C.W.N. 871.

Wrong-doer.

Possession of wrong-doer, not to be constructively extended over lands not actually in his possession—See PARTITION, No. 6, 12 C.W.N. 127.

Zaildari.

(1) *Claim of a candidate of the prevailing tribe in a zail—Superior right.*

Held that a person who belongs to a prevailing tribe in a zail and is also otherwise fit to act as a zaildar should be given preference over other candidates for the post. **Jafar**

Zaildari.—(Concluded).

Khan v. Raja Azimullah Khan, 2 P.W.R. 1907 (Rev.).

WALKER, FINANCIAL COMMISSIONER.

(2) *Zaildari—Punjab Land Revenue Act (XVII of 1887), S. 28—Rule 166 relating to zaildari—Appointment of an unqualified candidate as zaildar not allowed.*

Held, that no person is eligible for appointment as a zaildar unless he is a qualified candidate under Rule 166, before the appointment is made by the Collector. **Sardar Khan v. Bahadar Khan**, 3 P.W.R. 1907 (Rev.).

WALKER, FINANCIAL COMMISSIONER.

Zemindar and Inamdar.

Necessity for exchange of patta and muchlika—Act VIII of 1865—Applicability of summary provisions—See Act VIII of 1865 (RENT RECOVERY, MADRAS), No. 2, 17 M.L.J. 473.

Zuri-peshgi lease.

(1) Possession not delivered to mortgagee—Suit for recovery of possession dismissed—Suit for compensation—See LIMITATION ACT, No. 83, 4 A. L. J. 249.

(2) Rent realised by Zurpeshgidar after expiry of lease, suit for recovery of—See LIMITATION ACT, No. 64, 11 C.W.N. 862.

SUPPLEMENT.

Acts.

1. IMPERIAL ACTS.
2. BENGAL ACTS.
3. CENTRAL PROVINCES ACTS.
4. MADRAS ACTS.
5. PUNJAB ACTS.

1.—Imperial Acts.

Act XXI of 1880 (Freedom of Religion).

Feasibility of adopting the Act in Travancore Statute Book—See CONVERSION, No. 1, 22 T.L.R. 246.

Act X of 1865 (Succession).

Applicability of—to Syrian Christians in Travancore—See SUCCESSION, No. 1, 22 T.L.R. 192, IN THE BODY OF THE BOOK.

Act IX of 1875 (Majority).

- (1) S. 3—*Grant of Letters of Administration to de facto guardian of a minor—Act VIII of 1890, Ss. 7 (1), 5?—Declaration of guardianship.*

The Court does not, by merely granting Letters of Administration, under S. 13 of Act V of 1881, to the *de facto* guardian of a minor, in respect of an estate, to which the minor is an heir, appoint or declare such guardian as a guardian to the person or property of the minor, within the meaning of S. 7 (1) of Act VIII of 1890. Such grant of Letters of Administration is not, therefore, sufficient to bring the minor under the provisions of S. 3 of Act IX of 1875. **Ganeshi Lal v. Suraj Mal**, 89 P.R. 1906=90 P.L.R. 1907.

JOHNSTONE and LAL CHAND, JJ.

Act V of 1881 (Probate and Administration).

- (1) S. 3—*Grant of probate to trustees as executors according to tenor.*

The mere circumstance that the property is left by the will to trustees, without words referring to them as executors, would not prevent those persons being granted probate as executors according to the tenor, if, among

1.—Imperial Acts.—(Continued).

Act V of 1881 (Probate and Administration).

—*Concluded.*

the duties to be discharged by them under the will, there are included such duties as executors have to perform; but that should appear from the will. **N. Appacotty Mudali v. Muthukumarappa Mudali**, 16 M.L.J. 558=30 M. 191.

WHITE, C.J., and SUBRAHMANYA AIYAR, J.

References.—17 L.R.* Ir. p. 277, L.R. 3 P. and D. 157 and 2 P. and D. 369, R.

Act XXVI of 1881 (Negotiable instrument).

- (1) Ss. 4, 15—*A non-negotiable instrument, whether could be assigned by endorsement—Assignee, whether becomes entitled thereon to sue the maker.*

• This was a suit on a pro-note, without the words “order” or “bearer” or their equivalent, brought by the plaintiff, to whom the note had been assigned by endorsement thereon. It was pleaded in defence that a document, though a promissory note, was not a negotiable instrument and consequently could not be assigned by endorsement. *Held*, the document, not containing the necessary words to render it a negotiable instrument, was not capable of being transferred by mere endorsement, and it was not, therefore, competent for the assignee to maintain a suit upon it. **Parfitt v. Chain Sukh**, 144 P.R. 1906=106 P. L. R. 1907.

ROBERTSON, J.

References.—60 P.R. 1884, 12 P.R. 1894, 10 A. 20, 24 M. 654 & 28 M. 544, R.

Act VI of 1882 (Companies).

- (1) S. 136—*Execution of decree against Company in liquidation—Attachment of decree against Company—Attaching creditor's rights—Procedure.*

P obtained a decree against S. S had already obtained a decree against M & Co. M & Co., was ordered to be wound up. After such order, P, in execution of his decree against S, attached

I.—Imperial Acts.—(Continued).**Act VI of 1882 (Companies).—(Concluded).**

the decree which S had obtained against M & Co.

Held, that it would not be equitable for the Court to prevent P from executing his decree without seeing that his rights are respected in the liquidation, (a) and that the liquidator should be directed to recognise P as the representative of the decree holder and to allow him to prove for the decree debt in the name of the decree holder and to receive and apply dividends payable to the decree holder in satisfaction of his debt, subject to the like claims of other attaching creditors to rateable contribution. **Sesha Aiyar v. The Tinnevely Sarangapani Sugar Mill Company**, 30 M. 533.

BENSON & WALLIS, JJ.

Act VII of 1887 (Suits Valuation).

- (1) *S. 8—Amendment of valuation of suit in appeal—Court-fee—Jurisdiction.*

In a suit brought for an account, for the return of certain property, and for the cancellation of a power-of-attorney, the plaintiff valued the suit at Rs. 600. From the decree in this suit, the plaintiff appealed to the Chief Court valuing the appeal for the purposes of the Court Fees Act at Rs. 600, and for the purposes of jurisdiction at Rs. 13,800. It was held, that, as the value given for the purposes of Court fees both in the plaint and in the memorandum of appeal was only Rs. 600, the value for the purposes of jurisdiction, must, under S. 8 of the Suits Valuation Act, be taken at that figure, and that the plaintiff could not be allowed to amend the valuation so as to bring the appeal within the jurisdiction of the Chief Court. **Thein Yin v. Foucar Brothers & Co., Ltd.**, 4 L.B.R. 120.

HARTNOLL and MOORE, JJ.

- (2) *Ss. 8 & 9—Suit to direct registration of will—Method of valuation for purposes of jurisdiction—See JURISDICTION (OF MUNSHIFFS' COURTS), No. 1, 17 M.L.J. 573. IN THE BODY OF THE BOOK.*

Act IX of 1887 (Provincial Small Cause Courts).

- (1) *Ss. 16, 32 (2)—Civ. Pro. Code, S. 646 B—Institution of a suit before a Munsif exercising Small Cause Court powers up to a certain value—Trial by his successor invested with higher powers.*

Where a suit for recovery of a sum of Rs. 70 was instituted in the Court of a Munsif exercising Small Cause Court powers up to Rs. 50, and subsequently during the pendency of the suit

I.—Imperial Acts.—(Continued).**Act IX of 1887 (Provincial Small Cause Courts).—(Concluded).**

the Munsif was transferred and the substantive Munsif who succeeded him had powers of a Small Cause Court up to Rs. 100.

Held, that the suit should not be triped as if the powers of the Court remained the same as they were when the suit was instituted. **Mahima Chandra Sirdar v. Kali Mandol**, 12 C.W. N. 167.

RAMPINI, C.J., SHARFUDDIN, J.

Act VII of 1889 (Succession Certificate).

- (1) *S. 4—Application by heir of mortgagee for supplementary decree—Succession Certificate if necessary—"Debt"—Transfer of Property Act (IV of 1882), S. 90.*

Where after a preliminary decree had been made in a mortgage suit, the mortgagee died, and his sons got themselves substituted on the record, and an order absolute was made in their favour, but the proceeds of the sale of the mortgaged property proving insufficient, they applied for a personal decree for the balance under S. 90, Transfer of Property Act.

Held, (on a review of the authorities), that, until the applicants obtained a certificate under the Succession Certificate Act, no such decree could be made in their favour. **Sahadev Sukul v. Sheikh Sakhawat Hossein**, 12 C.W. N. 145.

MOOKERJEE and CASPERSZ, JJ.

Act IX of 1890 (Railways).

- (1) *Ss. 77 and 140—Goods lost in transit—Notice of claim—Sufficient notice.*

Notice of claim for goods lost in transit given to Railway Company A, with whom they were originally booked, is not sufficient notice within Ss. 77 and 140 of the Railways Act, to Railway Company B on whose line the goods were subsequently lost. **Talik Chand Lahuthy v. East India Railway Company**, 12 C.W.N. 165.

RAMPINI, C.J., and SHARFUDDIN, J.

References:—26 B. 669, P.

Act I of 1894 (Land Acquisition).

- (1) *Divisional Judge, whether could decline jurisdiction on denial of title by Government, on reference under the Act.*

Upon a reference under the Land Acquisition Act for decision of a matter by a Divisional Judge, his function is, ordinarily, apart from questions of apportionment among contesting

1.—Imperial Acts.—(Concluded).

Act I of 1894 (Land Acquisition).—(Concluded).

claimants, merely to see whether the Collector's award is or is not adequate, *i.e.*, the objectors have to show him that it is inadequate in amount and, in the absence of such proof, the award of Collector stands, whatever Government may have pleaded and the fact that the objector's title to the property was attempted to be denied by the Government does not enable the Judge to decline jurisdiction to determine the reference. **Amolal Shah v. The Collector of Lahore**, 115 P.R. 1906=87 P.L.R. 1907.

JOHNSTONE and HURRY, JJ.

References.—7 A. 817, 19 A. 339 and 30 C. 36 (P.C.), R.

2.—Bengal Acts.

Act VI of 1870 (Chowkidari).

(1) S. 51—*Recessumption of chakran land—Liassee from chowkidar, rights of.*

When chowkidari land is resumed and transferred by the Collector to the zemindar, the interest of the chowkidar in the land and, along with it, all rights created by him in favour of others, cease.

S. 51 of the Chowkidari Act does not save rights created by the chowkidar, but refers to contracts made by the zemindar in respect of the village in which the chowkidari land or any portion of it is situate. **Krishna Kinkar Dutta v. Mahanto Bahagaban Das**, 12 C.W.N. 161.

MITRA and CASPERSZ, JJ.

Act IX of 1880 (Cess).

S. 41—Whether it is open to zemindar and tenure-holder to contract themselves out of the provisions of S. 41 of—See **LANDLORD and TENANT**, No. 29, 12 C.W.N. 154, in the BODY OF THE BOOK.

3.—Central Provinces Acts.

Act XI of 1898 (C. P. Tenancy).

(1) Ss. 2 and 41—*Holding, nature of—Partition of holding, effect of—"devolves," effect of—*

A holding, under S. 2 (3), Tenancy Act 1898, is, by its very definition, a parcel of land held under one lease or set of conditions and is indivisible and cannot be affected by action to which the tenants alone are parties (a). Even if it were ancestral property in the hands of a father, and his son should acquire rights in it by birth, the son could not enforce a partition so

3.—Central Provinces Acts.—(Concluded).

Act XI of 1898 (C. P. Tenancy).—(Concluded).

as to bind the landlords to recognise each share as a separate holding.

By virtue of S. 41 (1) Tenancy Act, the right of an absolute occupancy tenant "devolves as if it were land" and the use of the word "devolves" appears by necessary implication to exclude, for example, the taking by survivorship which obtains among Hindus in respect of joint ancestral property. **Pancham Singh v. Nankoo Singh**, 3 N.L.R. 182.

H. V. DRAKE-BROCKMAN, A.J.C.

References.—(a) 1 W.R. 10 and 8 C. 118, *relied on*, (b) 4 C.P.L.R. 57 and 13 C.P.L.R. 137, *followed*; 11 C.P.L.R. 144, *referred to*.

4.—Madras Acts.

Act VIII of 1865 (Rent Recovery).

(1) Ss. 9 and 72—*Dismissal of a revenue suit for enforcement of acceptance of patta—Civil suit for rent on the basis of tender of proper patta—Res judicata.*

A decision of the Revenue Court dismissing a suit for the enforcement of acceptance of patta, under S. 9 of the Rent Recovery Act, would not operate as *res judicata*, in a civil suit for the same *fasli* based on the tender of the proper patta, as the Revenue Court has no jurisdiction to decide such suit for rent (a).

If, instead of dismissing the suit, the Revenue Court has settled the terms of the patta, the terms so settled would have constituted the final contract between the parties as to rent for the *fasli*, and the civil Court would have been bound to enforce this contract under S. 72 of the Act. (d) **Kedambi Venkatacharair v. Lakshmi doss**, 17 M.L.J. 601.

WALLIS and MILLER, JJ.

References.—(a) 20 M. 392, 29 C. 707 (P.C.), 25 A. 189, R; (b) 27 M. 65, *expl.*

5.—Punjab Acts.

Act IV of 1872 (Punjab Laws).

(1) S. 11—*Custom—Pre-emption—Taraf Ravi suburb of Multan City.*

The custom of pre-emption in respect to houses exists in the *Taraf Ravi* subdivision of the Multan City. **Abdulla v. Punnuram**, 85 P.L.R. 1907.

ROBERTSON and CHITTY, JJ.

Act XVI of 1887 (Tenancy).

(1) S. 77 (3)—*Suit for recovery of money paid to mortgagor for land revenue, whether,*

5.—Punjab Acts.—(Continued).**Act XVI of 1887 (Tenancy).—(Continued).**

within the jurisdiction of Revenue Courts—Suit in Revenue Court and subsequently in Civil Court—Right of parties to set up the want of jurisdiction of the Revenue Court.

The terms of S. 77 (3), which ousts the jurisdiction of Civil Courts must be construed strictly; cl. (i) must be taken to include suits *ejusdem generis* with those which are mentioned above it, and be confined to suits between parties *qua* landlord and tenant. It cannot be held to include a suit, the claim in which arises out of a contract of mortgage, merely because, between the mortgagor and the mortgagee, there subsists also the relationship of landlord and tenant. In other words, the claim in the suit must be directly referable to the lease or the conditions on which the tenancy is held. *Held*, also, a person who has selected the Revenue Court as his *forum*, has insisted throughout on its jurisdiction and has prosecuted the suit there up to the Court of final appeal, but has ultimately failed, not on the question of jurisdiction, but on the merits, should not be permitted, on the ground of want of jurisdiction in the Revenue Court, to ignore the previous proceedings entirely and prosecute his claim *de novo* in a Civil Court. **Jaimat Mal v. Khajr Muhammad**, 126 P.R. 1906=98 P.L.R. 1907.

ROBERTSON and CHITTY, JJ.

References:—10 W.R. 6, 8 M.H.C. 14 and G.P.B. 155, R.

(2) S. 77 (3) (d)—*Exchange of occupancy holdings—Suit by occupancy tenant for declaration that he is occupancy tenant by exchange—Jurisdiction.*

A suit by a person, claiming to be an occupancy tenant of specific land, for a declaration that he is an occupancy tenant, having exchanged his original occupancy holding with the original occupancy tenant of the land in suit, is a suit by a tenant to "establish a claim to a right of occupancy" under S. 77 (3) (d), and is, therefore, cognizable only by a Revenue Court.

There is no authority for the contention that S. 77 (3) (d) applies only to cases of occupancy rights acquired under S. 5 or S. 6 of the Tenancy Act, and the language of the subsection indicates no such limitation.

The question of jurisdiction must be settled with reference to the plaint (a). **Attar Singh**

5.—Punjab Acts.—(Concluded).**Act XVI of 1887 (Tenancy).—(Concluded).**

v. Rala Singh, 159 P. R. 1906=110 P. L. R. 1907.

REID, C. J.

References.—89 P. R. 1895, R; (a) 106 P. R. 1900, F.

Adverse Possession.

(1) —among Mahomedan co-heirs.

Where one of the heirs of a Mahomedan was receiving some benefit from a portion of the estate, the possession of the estate by another heir would not constitute adverse possession against the former, unless and until the knowledge that the former was intended to be excluded from the other portions is brought home to him. **Yaya Kunju Abdul Kunju v. Atchuthan Aiyappan**, 22 T.L.R. 107 (F.B.).

SADASIVA AIYAR, C.J. PADMANABHA AIYAR and RAMACHANDRA ROW, JJ.

References:—31 C. 970, F; 5 T.L.R. 14, 29 B. 300, 21 M. 159, 24 M. 441, R.

Alienation.

Validity of condition as to restraint on. See RESTRAINT ON ALIENATION, No. 1, 10 O.C. 136, IN THE BODY OF THE BOOK.

Appeal.

(1) Amendment of valuation of suit in appeal—Valuation for purposes of Court fees and for purposes of jurisdiction—ACT VII of 1877 (SUITS VALUATION, No. 1, 4 L.B.R. 120.

(2) Right of, from order under S. 225, C.P. C. (Travancore)—See CIV. PRO. CODE (TRAVANCORE), No. 1, 22 T.L.R. 172, IN THE BODY OF THE BOOK.

(3) Suit by agent—Dismissal of suit—Principal's right of appeal—See CIV. PRO. CODE, No. 1, 4 L.B.R. 95.

Attachment.

Sale of property by inferior Court while under attachment by superior Court—Effect—See LIMITATION REGULATION (TRAVANCORE), No. 1, 22 T.L.R. 147, IN THE BODY OF THE BOOK.

Buddhist Law (Inheritance).

(1) Property inherited by Burman Buddhist father after death of first wife and before marrying his second wife—Share of child by deceased wife.

Where a Burman Buddhist inherits property, moveable or immoveable, after the death of his first wife, by whom he had a son, and before

Buddhist Law (Inheritance).—(Concluded).

his marriage with his second wife, by whom he had children, and dies leaving him surviving, his son by his first wife, his second wife, and children by her, it was held that the son by the first marriage is entitled to one half share of such property. **Ma Leik v. Maung Nwa**, 4 L. B. R. 116.

HARTNOLL and MOORE, JJ.

References:—2 L.B.R. 174, 2 L.C. (Chan Toon), 97, 1 L.C. (Chan Toon) 292, S.J.L.B. 110, 6, 255, P.J.L.B. 534, R.

Buddhist Law. (Pre-emption).

- (1) *Suit for Pre-emption under Chinese Customary Law—Suit by Chinaman—Indian Succession Act, Ss. 5 & 331—Burma Laws Act, S. 13.*

In a suit by a daughter for pre-emption of certain properties which had belonged to her father, who was a Chinaman, brought under the Chinese Customary Law, it was held,

(1) if the father was not a Buddhist, the provisions of the Indian Succession Act applied to him, and not the law of China,

(2) if he was a Buddhist his estate would be exempted from the operation of the Indian Succession Act by S. 331 of that Act, and the Buddhist Law would form the rule of decision.

In this case, the father being a Chinese Buddhist, it would be necessary for the plaintiff to show that there is a Chinese Buddhist Law in China applicable to Chinese Buddhists only, as apart from the customary law of the country, applicable to all the inhabitants whether Buddhists or not, and that by that law there is a right of pre-emption in respect of the land in dispute. **Apana Charan Chodry v. Shwe Nu**, 4 L.B.R. 124.

HARTNOLL, J.

Reference:—2 L.B.R. 95, R.

Burden of proof.

- (1) *Suit for redemption—Plea of sale—Possession for thirty years, presumption from—Evidence Act S. 110.*

Where the plaintiff sues for the redemption of a mortgage, and the defendant denies the mortgage and alleges that he is in possession of the property under a sale, and where it was found that the defendant's possession extended over thirty years, it was held,

(1) that such possession was *prima facie* evidence of ownership (S. 110 of the Evidence Act);

Burden of proof.—(Concluded).

(2) that the burden of proving the mortgage lay on the plaintiff, and that, as such burden was not discharged, the plaintiff was not entitled to a decree, **Kanakku Savarimuthu v. Aundiperumal Gopala Krishnan**, 22 T.L.R. 89.

GOVINDA PILLAI, OFFG. C.J. and RAMACHANDRA ROW, J.

(2) Suit on an insurance policy to recover value of goods insured—*A* negation of fraud and misrepresentation—*O* nus—See *INSURANCE POLICY*, No. 1, 22 T.L.R. 99, IN THE BODY OF THE BOOK.

Civil Procedure Code.

- (1) *S. 27—Suit by agent in his own name—Dismissal of suit—Right of principal to appeal—substitution of principal's name as plaintiff—S. 230, Contract Act.*

Where a suit was instituted by an agent, in his own name, and without disclosing that he was merely an agent, and the suit was dismissed on the ground that the plaintiff being a mere agent could not sue in his own name, it was held, in an appeal by the principal:—

(1) That, as the suit was commenced in the name of a wrong person through a *bona fide* mistake and as it was necessary for the determination of the real matter in dispute that the principal's name should be substituted for that of the agent, such substitution might have been made under S. 27, C.P.C.

(2) that action under S. 27 C.P.C., might have been taken in this case, on the initiative of the principal, or of the agent, or of the Court itself, and,

(3) that the case was to be remanded, with the substitution of the name of the principal as plaintiff, for the determination of the case on the merits. **A.L.S.P.S. Soobramonion Chetty v. Myat Tha U**, 4 L.B.R. 95.

FOX, C.J. and IRWIN, J.

- *References*:—1 L.B.R. 191, 350, D; 2 N.W. P.H.C. 179, 21 B. 205, 20 M. 467, 12 W.R. 117, R.

(2) *S. 158—A holiday fixed for hearing of a case to suit plaintiff's Pleader—Refusal of pleader to appear on that day—Right of Court to proceed under S. 158.*

Where a gazetted holiday was fixed for hearing arguments in a case, by arrangement with the parties and so as to suit the convenience of the plaintiff's pleader, but the latter declined to appear on that day, it was held that neither

Civil-Procedure Code.—(Continued).

side having objected when the said date was fixed, it was their duty to be present on such day and, in default of their so appearing, the proper course for the Court was to proceed to judgment in terms of S. 158, Civ. Pro. Code. **Bhagwan Das v. Har Pershad**, 111 P.R. 1906 = 92 P.L.R. 1907.

KENSINGTON & CHITTY JJ.

References :—55 P.R. 1898 & 82 P.R. 1901, R.

(3) S. 235—Application for possession by mortgagor who has obtained a decree for redemption-form of. See MORTGAGE (REDEMPTION), No. 23, 4 L.B.R. 83, IN THE BODY OF THE BOOK.

(4) Ss. 244, 319—*Delivery of symbolical possession erroneously made—Fresh cause of action—Suit for possession—Delivery of wrong property.*

A delivery of symbolical possession, even erroneously, operates to give the person put in possession a fresh cause of action and to place the judgment-debtor in the position of a trespasser (a). A suit for actual possession of the mortgaged property by a purchaser at auction sale who had already obtained symbolical possession, under S. 319, of certain property which was alleged not to be the mortgaged property, would not be barred by S. 244 of the Civ. Pro. Code, although the plaintiff's proper course would have been to apply to the execution Court to decide, whether the land of which he wanted possession was the mortgaged property sold to him, instead of obtaining possession under S. 319 of the Code. **Govind Bidiraji Bhukta v. Akella Yenkata Sastrulu**, 17 M. L. J. 598.

MILLER and MUNRO, JJ.

References :—(a) 24 C. 715, 22 B. 667, R.

(5) S. 258—*Payment out of Court—Duty of decree-holder receiving payment—Failure to certify payment to Court—Suit by judgment-debtor to recover amount—Damages—*

The law casts on a decree-holder receiving payment of the judgment-debt out of Court, the duty of certifying such payment in satisfaction of the decree; and if he fails to do so, there is a breach of that duty. This implies that a cause of action accrues when the judgment creditor fails to fulfil his duty in the matter (a).

So, where a judgment-debtor remitted money by Post Office Money Order, which was received by the decree-holder, who failed, however, to

Civil Procedure Code.—(Concluded).

certify receipt of the amount and enter satisfaction in Court; it was held, that a suit would lie to recover the amount so paid, as damages, by reason of the defendant's failure to certify it to the Court. **Medai Thalavoi Kallam Anni**, 3 M.L.T. 15 = 30 M. 545.

SUBRAHMANIA AIYAR, J.

References :—(a) 5 M. 397 (F.B.), F. Referred Case No. 9 of 1905, Madras (Unreported), not F.

(6) S. 278—Attachment of mortgaged property in execution of mortgage-decree—Application for removal of attachment, whether maintainable—See MORTGAGE (GENERAL), No. 26, 4 L.B.R. 82, IN THE BODY OF THE BOOK.

(7) S. 310 A—Right to recover money erroneously deposited under S. 310 A—Voluntary payment—See CONTRACT ACT, No. 34—B. 12 C. W. N. 151, IN THE BODY OF THE BOOK.

(8) S. 311—*Conducting a sale before time advertised in the proclamation—Material irregularity.*

Conducting a sale in execution of a decree before time advertised in the proclamation for sale—the hour advertised being 10 A.M., and the hour at which the sale took place being 8 A.M.—is a material irregularity in the conduct of the sale, within the meaning of S. 311, C.P.C. **Sit Pwan v. Ngwe Thain**, 4 L.B.R. 123.

HARTNOLL, J.

References :—16 C. 794, Diss; 24 C. 291, F.

Civ. Pro. Code (Travancore).

(1) S. 9—*Res Judicata—Consent decree—Defendant's right to plead his own fraud in a subsequent suit.*

In a suit to set aside an alienation made by the defendant in contravention of a compromise decree and the deed of agreement executed in pursuance of that decree, the defendant would not be allowed to contend that the consent decree, in the previous suit, was allowed to be passed fraudulently in order to defeat the creditors; and, therefore, was not binding on him. Nor could the alienees from the defendant impeach the consent decree if they were not transferees for consideration (a).

For purposes of *res judicata*, a consent decree has the same effect as one duly contested (b). **Kalliani Kunju Kunju v. Narayanan Krishnan** 22 T.L.R. 255.

GOVINDA PILLAI and RAMAIAHNDRA ROW, JJ.

Civil Procedure Code Travancore.—(Could).

References:—(a) 6 B. 703, 11 B. 708, 10 M. 17, 18 M. 378, R; 21 W.R. 424, 24 W.R. 392, *Diss*; 27 C. 11, D; (b) 24 C. 216, R.

- (2) *Ss. 97, 152 & 153 (Ss. 102, 157, 158 of the British Code)*—Dismissal of suit for non-appearance of plaintiff or his Vakil—Appeal.

An order dismissing a suit for the non-appearance of the plaintiff in person or by a Vakil is an order passed, under S. 152 and 97 of the Travancore Code, and not one, under S. 153, and is, therefore, appealable. **Mytheen Pillai Metharu Kochu Sivarani Pillai v. Kochachu Ummal Pathummal**, 22 T.L.R. 262.

SADASIVA AIYAR, C.J., and RAMACHANDRA ROW, J.

References:—8 C.W.N. 313, 30 C. 600, 1 M.L.J. 385, F; 15 A. 359, 22 M. 221, *Diss*; 7 M. 41, 25 A. 194, 20 B. 736, 23 B. 414, 16 B. 23, 9 A. 427 R.

- (3) S. 283, suit under—Whether S. 42 of Specific Relief Act applicable—See SPECIFIC RELIEF ACT, No. 10, 22 T.L.R. 88, in the body of the book.

(4) S. 324—Sale of property by inferior Court while under attachment by superior Court—Validity—Obstruction under S. 324—Regular suit—Limitation—See LIMITATION REGULATION (TRAVANCORE), No. 0, 22 T.L.R. 147, in the body of the book.

- (5) *Ss. 352, 356 (Ss. 368 & 372 of the British Code)*—Application to bring in the legal representative of a deceased defendant—Limitation.

An application by the plaintiff to bring on the record the legal representative of a deceased defendant, is an application under S. 352 of the Travancore Code and, not one under S. 356. Such an application should be made within 60 days, unless sufficient cause is shown for the delay. **Mathai Maria v. Koshi Umman**, 22 T.L.R. 266.

SADASIVA AIYAR, C.J., and HUNT, J.

References:—22 A. 234, 26 M. 230, 31 C. 487, 16 B. 27, F; 8 C.W.N. 837—30 C. 609, *Diss*.

Contract Act (Travancore).

(1) Defendant (Sirkar) receiving money of plaintiff—Circumstances rendering receipt of it receipt for plaintiff's use—Plaintiff entitled to recover—principle not affected by S. 72—See LIMITATION REGULATION (TRAVANCORE), No. 1, 22 T.L.R. 54, IN THE BODY OF THE BOOK.

Contract Act (Travancore).—(Concluded).

- (2) *Ss. 69 & 70—Scope and application—Funeral expenses of deceased Karnavan incurred by his children—Right to re-imbursement.*

To support a claim under S. 70, Indian Contract Act, there must be an obligation express or implied to re-pay, and the question is not to be determined by nice considerations of what may be fair or proper according to the highest morality (a). And the section ought not to be so read as to justify the officious interference of one man with the affairs or property of another, or to impose obligations in respect of services, which the person sought to be charged did not wish to be rendered (b).

With regard to the ceremonies and feasting connected with the death of the Karnavan, if an Anandavan defrays the charges incidental thereto, it would be an expenditure in which the law considers him "interested," and such charges ought to be re-imbursed to the Anandavan (c). If on the other hand, the children of the deceased Karnavan defray the above charges, it is only a voluntary act arising from a sense of filial duty which must be understood to be gratuitous and so would be outside the scope of S. 70. But on grounds of public policy and of pressing necessity, a contract to re-imburse the actual cremation charges may in such cases be inferred on behalf of one who incurred the same even without the knowledge of the party interested and this item may therefore be claimed by the children of the deceased under S. 70 of the Act. **Ananthu Narayani v. Iravi Nilakantan**, 22 T.L.R. 139.

GOVINDA PILLAI and RAMACHANDRA ROW, JJ.

References:—(a) 2 I.A. 131 (143), R, (b) 18 M. 88 (93), R; (c) 9 T.L.R. 126, F; 23 M. 512, 27 B 390, R.

Conversion.

- (1) *Shanars—Right of Christian convert to inherit.*

By custom among Shanars, conversion does not deprive the convert of his civil rights in the original family. He is not, therefore, deprived, by reason of his conversion, of his rights to inherit a share in his family property and of management.

Per Hunt, J.—Act XXI of 1850, may, with advantage, be adopted in Travancore Statute Book.

Per Sadasiva Aiyar C.J.—I do not feel prepared to agree with my learned colleague "that

Conversion.—(Concluded).

Act XXI of 1850 might be with advantage adopted in our Statute Book" in its entirety. I think however, that, so far as the Hindu castes and classes lower than Sudras are concerned, it might be declared by Statute that conversion to Christianity does not entail forfeiture of civil rights, except the rights of trusteeship of caste temples. But if such a new Act is passed, it should further declare that, not only does the convert not forfeit his rights of inheritance to non-converts, but that, reciprocally, the convert's properties can be inherited by his unconverted relations. **Masanamuthu Sivanaduma Nadan v. Gopalakrishna Pillai Ramaswami Pillai**, 22 T. L. R. 246.

SADASIVA AIYAR, C. J., HUNT, J.

References:—4 T. L. R. 12, 16 T. L. R. 16, *D.*

Court Fees Regulation (Travancore).

S. 4, cl. (8) (a).—*Court fee on mortgage suits.*

Under S. 4, cl. (8) (a) of the Court Fees Regulation, the Court fee in a redemption suit should be paid on the principal money expressed to be secured by the instrument of mortgage, whether that amount is increased by interest afterwards, or diminished by subsequent payments. **Govinda Narayanan v. Narayana Aiyar Sankara Aiyar**, 22 T. L. R. 268.

SADASIVA AIYAR, C. J., and HUNT, J.

Reference:—14 M. 480, *R.*

Decree holder.

Right of, where debt is wrongly entered in the schedules—See **INSOLVENCY**, No. 1, 10 O. C. 305, IN THE BODY OF THE BOOK.

Estoppel.

Applicability to junior members of a Tarwad—See **MARUMAKKATHAYAM LAW**, No. 2, 22 T. L. R. 121, IN THE BODY OF THE BOOK.

Evidence Act (1 of 1872).

(1) S. 44—Avoiding of judgment—Incompetency alleged must be, not latent, but patent—See **LANDLORD AND TENANT**, No. 2, 3 N.L.R. 185.

Evidence Act (Travancore).

(4) S. 110—Suit for redemption—Plea of sale—Possession for thirty years, presumption from—See **BURDEN OF PROOF**, No. 1, 22 T.L.R. 89.

Execution of decree.

Transfer of decree—Application to the Court which passed the decree to re-call it—Step in aid of execution—Effect of both original and executing Court executing the decree—See **LIMITATION REGULATION (TRAVANCORE)**, No. 5, 22 T.L.R. 83, IN THE BODY OF THE BOOK.

Execution Sale.

(1)—by Collector—Judgment-debtor applying to set aside the sale—Deposit in Court of the decretal amount and 5 per centum of the purchase money—Refusal to set aside the sale—Confirmed sale can be set aside—Collector's power to set it aside—See **CIV. PRO. CODE**, No. 175, 9 Bom. L.R. 15, IN THE BODY OF THE BOOK.

(2) Conduct of, in a place other than that mentioned in the proclamation, whether a material irregularity—See **CIV. PRO. CODE**, No. 164, 132 P.R. 1906=11 P.L.R. 1907, IN THE BODY OF THE BOOK.

(3) Conducting a sale before time advertised in the proclamation for sale, is a material irregularity—See **CIV. PRO. CODE**, No. 8, 4 L.B.R. 123.

Fraud.

General allegations of—Effect—See **LIMITATION REGULATION (TRAVANCORE)**, No. 2, 22 T. L. R. 143, IN THE BODY OF THE BOOK.

Hindu Law (Inheritance).

Survivorship—Joint ancestral property—S. 41 (1)—Act 1898 (C.P. Tenancy), effect of—See **ACT XI OF 1898 (C. P. TENANCY)**, No. 1, 3 N.L.R. 182.

Holiday.

Hearing of case fixed for a on arrangement with parties—Duty of parties to attend on such day—See **CIV. PRO. CODE**, No. 2, 111 P.R. 1906=92 P.L.R. 1907.

Husband and Wife.

(1) Implied authority of wife to pledge husband's credit—Husband's express prohibition—Effect.

In a suit by the plaintiffs against a husband for the price of articles supplied to his wife, it was found that the wife lived in Ootacamund with her children while her husband resided in Coorg, that the husband was remitting to her sufficient money for her support and that of her children, and had also expressly forbidden her to contract any debts on his credit.

Held that these circumstances were sufficient to rebut the presumption of the implied

Husband and Wife.—(Concluded).

authority on the part of the wife to pledge her husband's credit for her necessaries. **Mahomed Sultan Sahib v. Horace Robinson**, 30 M. 543.

WALPIS, J.

References :—6 App. Cas. 24. (1903) 1 K. B. 64, 15 C. B. N. S. 628, R.

Interest.

Tender by debtor—Creditor's wrongful refusal—Subsequent suit by creditor—Debtor's failure to pay amount in Court—Effect on interest—See **TENDER**, No. 2, 4 L. B. R. 108, IN THE BODY OF THE BOOK.

Jurisdiction (General).

(1) Exchange of occupancy rights—Suit by tenant for declaration that he is occupancy tenant by exchange.—See ACT XVI OF 1887 (PUNJAB TENANCY), No. 2, 139 P. R. 1906 = 110 P. L. R. 1907.

Jurisdiction (of Rev. Courts).

(1) Suit to recover money advanced to mortgagor for land revenue, whether cognizable by Revenue Court—See ACT XVI OF 1887 (PUNJAB TENANCY), No. 1, 126 P. R. 1906 = 98 P. L. R. 1907.

(2) Suit for rent based on the tender of proper patta—Jurisdiction—See Madras ACT VIII OF 1865 (RENT RECOVERY), No. 1, 17 M. L. J. 601.

Landlord and tenant.

(1) Chalgani and mulgeni tenancy presumption as to—Immemorial possession at uniform rate, presumption from—Tenant in South Canara.

In South Canara there is no presumption that a tenancy is either *chalgani* or *mulgeni*. Where the tenants prove immemorial possession on a uniform rent, it raises a presumption in favour of *Mulgeni*. It is then on the other party to show that the tenants were only *chalgani*, by proving that such was the origin of the tenancy, or, that subsequent dealings are consistent only with that tenure. **Kittu Hegadthi v. Channamma Shettathi**, 30 M. 328.

DAVIES and SANKARAN NAIR, JJ.

References :—S.A. Nos. 187 & 188 of 1879, R.

(2) Evidence Act (I of 1872), S. 14—Avoiding of judgment—Incompetency—Tenancy in Central Provinces—Created by Tenancy Act, operation of—Usurper in return for services.

Landlord and tenant.—(Concluded).

Where a party seeks, under S. 44 of the Evidence Act, to avoid a judgment on the ground that it was delivered by a Court not competent to deliver it, that incompetency must be patent and not latent—a manifest lack of jurisdiction on the face of the proceedings. Where, on the view of the facts and law taken by it, a Court has jurisdiction to decide a case before it then its decision can only be avoided by review, appeal or revision. It cannot be reopened on the merits in a subsequent suit by some other original Court of concurrent jurisdiction, merely because the presiding Judge in the subsequent case takes a view of the law and facts different from that taken by the Judge in the previous case.

A tenancy, in the Central Provinces, can, in the first instance, be created only by a contract between the landlord of the soil and a person whom he is willing to accept as his tenant. It is only when a voluntary contract has created a tenant that the Tenancy Act fastens itself upon the transaction and regulates the future rights and liabilities of landlord and tenant. The whole position turns upon the original agreement between the parties in every single case.

Where plaintiff appointed the defendant as his agent for carrying on the duties of *mokud-dum* in his village, and in remuneration for those services and for no other purposes allowed the defendant to occupy and cultivate his *sir* field and to appropriate the entire produce thereof without any payment of rent, except a nominal one, held, that the defendant was never a tenant of the plot whereof he was allowed the usufruct in return for his services.

(a) **Wasudeo Gharpure v. Ganu Kunbi**, 3 N.L. R. 185.

STANYON, A.J.C.

References :—(a) 1 C.P.L.R. 182, Followed, 15 C. P. L. R. 42, R.

Mahomedan Law (succession).

(1) Succession—Grand-children by predeceased son—Evidence Act, S. 108—Presumption of death of missing person—Onus—Missing heir preservation of, share of, upon partition.

Under the Mahomedan Law, if any of the children of a man die before the opening of the succession to his estate, leaving children behind, these grand-children are entirely excluded from the inheritance by their uncles and aunts.

A, the son of H, a Mahomedan, disappeared as a mendicant in 1870, and was not known to

Mahomedan Law (succession).—(Concluded).

have been either seen or heard of since then; H died in 1884; a claim was set up by C, the son of A to share in the estate of H; it was held that under S. 109 of the Evidence Act, the onus was upon C to prove that his father, A, had survived his grandfather, H.

It was held, further, that this onus was not discharged by proof that, in an arbitration award made in 1888, a share had been set apart for A, because this was consistent with the principle of Mahomedan Law, that a share ought to be reserved for a missing heir. **Moolla Cassim v. Moolla Abdul Rahim**, 2 C.L.J. 236 (P.C.) = 15 M.L.J. 317 = 7 Bom. L.R. 892 = 2 A.L.J. 798 = 10 C.W.N. 33 = 33 C. 173 = 32 I.A. 177 = 4 L.B.R. 77.

LORD DAVEY, SIR ANDREW SCOBLE and
SIR ARTHUR WILSON.

Marumakhathayam Law.

Funeral expenses of deceased Karnavan incurred by his children—Right to imbursement—See CONTRACT ACT, No. 2, 22 T.L.R. 139.

Mortgagor and Mortgagee.

(1) Suit against mortgagor for land revenue advanced, whether within jurisdiction of Revenue Court. See ACT XVI OF 1887 (PUNJAB TENANCY), No. 1, 126 P.R. 1906 = 98 P.L.R. 1907.

Mortgage (Redemption).

Suit for redemption—Court fee—See COURT FEES REGULATION (TRAVANCORE), No. 1, 22 T. L. R. 268.

Notice.

—Goods booked with one Railway Company—Loss on the line of another Company—Notice of Claim—Sufficient notice—See ACT IX OF 1890 (RAILWAYS), No. 1, 12 C.W.N. 165.

Pre-emption.

(1) Suit for, by the daughter of a Chinese Buddhist—What law applicable—See BUD-

Pre-emption.—(Concluded).

DHIST LAW (PRE-EMPTION), No. 1, 4 L. B. R. 124.

(2) Custom of, in respect to houses exists in *Taraf Ravi* sub-division of Multan City. See ACT IV OF 1872 (PUNJAB LAWS), No. 1, 85 P. L. R. 1907.

Principal and Agent.

Suit by agent—Dismissal of suit—Principal's right of appeal—See C. P. C., No. 1, 4 L. B. R. 95.

Pro-Note.

(1)—not containing words of negotiability, whether could be assigned by endorsement—See ACT XXVI OF 1881 (NEGOTIABLE INSTRUMENTS), No. 1, 144 P. R. 1906 = 106 P. L. R. 1907.

Res Judicata.

Dismissal of suit to enforce acceptance of patta by Revenue Court—Subsequent civil suit for recovery of rent on the basis of tender of proper patta—See MADRAS ACT VIII OF 1865 (RENT RECOVERY), No. 1, 17 M.L.J. 601.

Review.

(1) Order of a District Judge under S. 7 of the Guardian and Wards Act, whether open to—See ACT VIII OF 1890 (GUARDIAN AND WARDS), No. 1, 143 P.R. 1906 = 105 P.L.R. 1907.

Transfer of Property Act.

S. 90—Application by heir of mortgagee for supplementary decree—succession certificate if necessary—See ACT VII OF 1889 (SUCCESSION CERTIFICATE), No. 1, 12 C.W.N. 145.

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